81 -2332

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In the Supreme Court of the United States

October Term 1982

NORFOLK REDEVELOPMENT AND HOUSING AUTHORITY, a political subdivision of the Commonwealth of Virginia,
Petitioner,

v.

THE CHESAPEAKE AND POTOMAC TELEPHONE COMPANY OF VIRGINIA,
Respondent,

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTION PRESENTED

Whether the Chesapeake and Potomac Telephone Company of Virginia, a public utility created under the laws of the Commonwealth of Virginia, is a "displaced person" under the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, 84 Stat. 1894, 42 U.S.C. §§4601 et seq. (Uniform Relocation Act) when it seeks reimbursement for the cost of removing its distribution facilities from public rights-of-way in the execution of an urban renewal project funded in part by grants from the Department of Housing and Urban Development.

THE PARTIES TO THE PROCEEDINGS BELOW

Moon Landrieu, in his official capacity as Secretary of Housing and Urban Development, was also a party defendant in the proceedings below. As the urban renewal projects involved in this litigation have proceeded to financial settlement, the responsibility for payment of any judgment rendered in this case will fall upon the petitioner, not the Department of Housing and Urban Development (HUD). Accordingly, HUD has not joined in this petition.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
THE PARTIES BELOW	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	v
PRAYER FOR WRIT	1
OPINIONS BELOW	2
JURISDICTION	2
STATUTE INVOLVED	3
STATEMENT OF FACTS	3
REASONS FOR GRANTING THE WRIT	9
1. The Court of Appeals has decided an important federal question of first impression which has not been, but should be, settled by this Court.	9
2. The Court of Appeals departed from the accepted and usual course of judicial proceedings when it changed the common law despite the fact that there is	15

Page

no statutory language in the Uniform Relocation Act on which to base such a change.

3. The decision below will have an immediate, unfair and nationwide effect. 22

CONCLUSION 27

CERTIFICATE OF SERVICE 29

APPENDIX

A. Opinion of the U.S. Circuit Court of Appeals A-1 to A-14

B. Opinion of the U.S. District Court B-1 to B-13

C. Mountain States Tel. & Tel. Co. v. Boise Redevelopment Agency C-1 to C-23

D. Pertinent Provisions of the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970. D-1 to D-7

TABLE OF AUTHORITIES

Cases

	Page
Alexander v. HUD, 441 U.S. 39, 99 S. Ct. 1572, 60 L. Ed. 2d.28 (1979)	11
Artesian Water Company v. State Department of Highways and Transportation, 330 A.2d. 432, (1974)	13
Erlenbaugh v. United States, 409 U.S. 239, 34 L. Ed. 2d, 446, 93 S. Ct. 477 (1972)	21
Fairfax's Devisee v. Hunter's Lessee, 11 U.S. 603, 3 L. Ed. 453 (1812)	21
Mountain States Tel & Tel. Co. v. Boise Redevelopment Agency (unreported)	13
Mumpower v. Housing Authority, 176 Va. 426, 11 S.E.2d 732 (1940)	4
Pacific Tel. and Tel. Co. v. Redevelopment Agency of Glendale, 151 Cal. Rptr. 68, 87 Cal. App. 3d 299 (1978)	13

	Page
Potomac Electric Power Company v. Fugate, 211 Va. 745, 180 S.E.2d 657 (1971)	15
Shaw v. Merchants' National Bank of St. Louis, 101 U.S. 557, 25 L. Ed. 892 (1880)	20
Statutes	
District of Columbia Public Utilities Reimbursement Act of 1972 (P.L. 92-495)	16,24
Virginia Housing Authorities Law §36-1, et seq., Code of Virginia	3
Miscellaneous	
House Report 92-906, Committee on the District of Columbia	16,24

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THE CHESAPEAKE AND POTOMAC TELEPHONE COMPANY OF VIRGINIA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petitioner, Norfolk Redevelopment and Housing Authority, prays that a writ of certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Fourth Circuit rendered in this case on March 25, 1982.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit, as yet unreported, appears in Appendix A. The opinion of the United States District Court for the Eastern District of Virginia, also unreported, appears in the Appendix B. Jurisdiction in the District Court was invoked under 42 U.S.C. 1331.

JURISDICTION

The opinion of the United States Court of Appeals for the Fourth Circuit was rendered on March 25, 1982. This Petition for writ of certiorari was filed within ninety days from the date of the judgment of the Court of Appeals. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTE INVOLVED

The Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, 84 Stat. 1894, 42 U.S.C. §§4601 et seq. (Set out in Appendix D.)

STATEMENT OF FACTS

Norfolk Redevelopment and Housing Authority (NRHA), with financial assistance from the federal government through the Department of Housing and Urban Development (HUD) or its predecessor agencies, embarked upon urban renewal projects in the City of Norfolk pursuant to the Virginia Housing Authorities Law, §§36-1 et seq. of the 1950 Code of Virginia, as amended (Housing Authorities Law).

NRHA is an autonomous political subdivision of the Commonwealth of Virginia, independent of but located

in the City of Norfolk, Virginia. In executing urban renewal projects under the Housing Authorities Law, it was the function of NRHA to acquire the land. After this was accomplished it was expected[1] that the City of Norfolk would make changes in zoning and close designated streets to facilitate the ultimate redevelopment of the cleared land by public or private enterprise. The land acquisition process in each project involved hundreds of parcels and required a number of years to complete. It was only after the land on each side of designated public rights-of-way within the project area had been acquired, that

1. We use the word "expected" because the City Council cannot under Virginia law delegate these legislative decisions to NRHA. See Mumpower v. Housing Authority, 176 Va. 426, 11 S.E.2d 732 (1940), at page 452.

NRHA could file its petitions with the City Council requesting closure of the designated streets.[2]

Under Virginia law, when NRHA (like any other purchaser) acquired a parcel of land abutting a public right-of-way, it also acquired the underlying fee of the adjoining right-of-way extending out to its center line, but subject to the public easemert for use and travel. Subsequently, when City Council adopted the street closing ordinance, the public easement for use and travel was extinguished.

2. For example, in the Rosemont Redevelopment Project the acquisition of land began in 1963 and was completed in 1968. Some streets were closed in 1967 and others were closed in 1968. The removal of utilities did not begin until 1972 and was completed in 1975. It was only when the ultimate reuse of the land was settled upon that the utilities were required to relocate their lines.

Chesapeake and Potomac Telephone Company of Virginia (C & P), pursuant to a franchise agreement entered into between its predecessor and the City of Norfolk in 1898, had placed its distribution facilities underground within the public rights-of-way of many of the streets in the City of Norfolk. Some of the streets closed in the urban renewal project areas contained distribution facilities which had been so located. Only when the presence of the distribution lines was inconsistent with the intended future use of the project land was C & P required to remove its facilities. Thus, the removal of the distribution facilities was done to facilitate the purposes of the project; it was not caused by the acquisition of real property.

Under its franchise agreement with the City of Norfolk, C & P paid nothing for the right to place its distribution facilities in the streets and it was obligated, upon request of the City, to abandon or remove them without charge. The cost of removal was a part of its cost of doing business, paid for by the income derived under its rate structure approved by the State Corporation Commission of the State of Virginia.

Prior to the adoption of the Uniform Relocation Act in 1970, C & P removed its facilities from the street rights-of-way whenever requested to do so by the City of Norfolk without making any claim for compensation of any sort. After the passage of the Uniform Relocation Act, C & P continued to relocate its facilities at

its expense whenever it was requested to do so for the convenience of the public use and travel; but it filed the claim involved in this case to recover expenses incurred in removing its facilities from streets which had been closed to carry out the execution of the renewal plans. To the best of Petitioner's knowledge, no other utility company in Virginia has filed such a claim.

The C & P claim was reviewed administratively by NRHA and was denied. A review of that decision was made by the Area Office of HUD, which concurred in the denial. C & P then filed a complaint in the United States District Court for the Eastern District of Virginia seeking a declaration that it was entitled to reimbursement under the Uniform Relocation

Act and seeking payment for that alleged entitlement. The District Court, by an opinion dated June 4, 1981, denied the claim of C & P. Thereupon, C & P appealed to the Circuit Court of Appeals for the Fourth Circuit, which on March 25, 1982 issued its opinion declaring that C & P was a "displaced person" under the Act and that under the circumstances of this case it was entitled to relocation benefits. It is for a review of that opinion that NRHA seeks a writ of certiorari.

REASONS FOR GRANTING THE WRIT

1. THE COURT OF APPEALS HAS DECIDED AN IMPORTANT FEDERAL QUESTION OF FIRST IMPRESSION WHICH HAS NOT BEEN, BUT SHOULD BE SETTLED BY THIS COURT.

The Uniform Relocation Act provides a variety of benefits to persons

who meet the statutory requirements for eligibility as "displaced persons." It authorizes payment of moving and related expenses, (42 U.S.C. §4622); replacement housing payments of up to $15,000 for homeowners and $4,000 for tenants (42 U.S.C. §4623 and 4624); and relocation assistance advisory services, (42 U.S.C. §4625). Nowhere does the Act refer to or authorize payments to utilities for removing their distribution facilities from the public rights-of-way.

The definition of a "displaced person" is contained in Section 101(6) of the Act, 42 U.S.C. §4601 (6), which provides in relevant part:

> "The term 'displaced person' means any person who...moves from real property, or moves his personal property from real property, as a result of the acquisition of such real property...or as the result of the

> written order of the acquiring agency to vacate real property, for a program or project undertaken by a Federal agency, or with Federal financial assistance...." (App. D, p. D-2)

We are here concerned with an entity which claims it has moved "... personal property from real property, as a result of the acqusition of such real property...."

The fact that this statute has broad, national implications was recognized by this Court in Alexander v. HUD, 441 U.S. 39, 60 L.Ed.2d 28, 99 S.Ct. 1572 (1979) when the Court construed the "written order" clause of the Uniform Relocation Act and noted that it was not designed to compensate just anyone dislocated by a federally assisted program, but only those directly affected by land acquisition. The instant case has the same broad

implications. Futhermore, review by this Court is required because of the abrupt turnabout in the administration of the Act caused by the decision below. The ruling of the Court of Appeals is contrary to the way the Uniform Relocation Act was interpreted by the utility companies and the government agencies.[3] It also is contrary to the settled common law of the sovereign states, contrary to the legislative history of the Act and is contrary to the decision of every

3. 42 U.S.C. §4633 requires the heads of federal agencies to "...consult together on the establishment of regulations and procedures for the implementations of such programs." Prior to enactment of the Uniform Relocation Act HUD had issued its Urban Renewal Handbook which included guidance for relocation assistance. In pertinent part it provided:

> "Removal or relocation of utility lines owned by a private utility company will not be allowed as a project expendi-

court which has considered the issue.[4]

The impact of the decision will be nationwide. The Uniform Relocation Act affects some 50 federal programs administered by 21 federal agencies. In addition, some 41 states have adopted relocation statutes which are similar to the Uniform Relocation Act or permit compliance with the terms of

> ture unless compensation to the company is required under applicable State statutes, judicial decisions, or pre-existing local ordinances or provisions of the company's franchise.****" (RHA §7209.1)

The HUD manual was not changed after adoption of the Uniform Relocation Act.

4. See Pacific Tel & Tel Co. v. Redevelopment Agency of Glendale, 151 Cal. Rptr. 68, 87 Cal. App. 3d 299 (1978); Artesian Water Company v. State Department of Highways and Transportation, 330 A.2d. 432, (1974); Mountain States Tel & Tel Co. v. Boise Redevelopment Agency (unreported State Court opinion printed as Appendix C).

the Act. Accordingly, by virtue of this new interpretation of the Act, countless cities and other state agencies will find that their program funds will be reduced by having to make payments to utilities which were not contemplated or budgeted at the time program applications were filed. The claim in this case, stated at $686,422.53 (plus claimed interest since various stated dates in the mid seventies), will mean that central city capital improvements will have to be reduced by the amount paid to C & P not withstanding the inequitable fact that the C & P rate structure has already compensated C & P for these expenses. In times of increasing federal austerity and with the impact of the New Federalism shifting program expenses to state and local govern-

ments, the impact of this decision on local resources will be far reaching.

2. THE COURT OF APPEALS DEPARTED FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS WHEN IT CHANGED THE COMMON LAW DESPITE THE FACT THAT THERE IS NO STATUTORY LANGUAGE IN THE UNIFORM RELOCATION ACT OR ITS LEGISLATIVE HISTORY ON WHICH TO BASE SUCH A CHANGE.

Under the common law, utilities are required to relocate their distribution facilities from the public rights-of-way without compensation when requested to do so by the local governing body. Potomac Electric Power Company v. Fugate, 211 Va. 745, 180 S.E.2d. 657 (1971). The nature of the franchise right was described by the Virginia Supreme Court in Fugate as a mere license, revocable at will, which does not confer any property right on the utility (Ibid., at 747).

It is broadly acknowledged that

any change in a practice established under the common law requires specific legislation. It was because of this rule of construction that the District of Columbia Public Utilities Reimbursement Act of 1972, Public Law 92-495, 86 Stat. 812, was passed (two years after the Uniform Relocation Act had been enacted) to amend the District of Columbia Redevelopment Act of 1945 so as to permit payments to utilities for relocating their facilities from public rights-of-way in urban renewal programs in the District of Columbia. The Commissioners of the District of Columbia supported the legislation, saying in part:

> "In general, costs incident to the removal or relocation of electric, telephone, and gas utility facilities, when such removal or relocation is necessitated by governmental

> action, have traditionally been bourne (sic) by the public utilities affected thereby. This requirement is one of long-standing and is based on the view that utility companies acquire no vested interests in the public space of the District of Columbia by the grant of a franchise to construct and maintain utility lines, conduits, pipes, and related facilities, and that when the needs of the Federal or District Governments so require in connection with the construction of public buildings and other public works, such utilities are obliged to remove, divert, or relocate their facilities without cost to the respective governments...." (House Report 92-906, p.7)

The Uniform Relocation Act and its legislative history are silent as to benefits for the relocation of utility distribution lines. Nevertheless, the Court of Appeals reversed the common law on this point, saying:

"Congress' failure to mention utilities during the debates on the Act and in the legislative history of the Act also provides little reason to exclude utilities from the Act's coverage... (App. A, p. A-6)

"In the absence of any clear legislative intent to exclude utilities, it is this court's duty to apply the literal language of the statute. Doing so, we find that a utility comes within the Act's definition of 'business' and thus is a 'displaced person' under the Act." (App. A, p. A-7)

The rationale used by the Court of Appeals is directly opposite to the rule of interpretation applied by this Court in Alexander v. HUD, supra, where it was said:

"In sum, the legislative history of the written order clause reveals no congressional intent to extend relocation benefits beyond the acquisition context. Rather, this clause merely ensures that assistance is available for a distinct group of persons directed to move because

> of a contemplated acquisition, whether the agency ultimately acquires the property or not. The written order clause therefore preserves the original meaning of a displaced person, since it does not apply unless a proposed acquisition directly causes issuance of the notice to vacate and the property acquisition is intended to further a federal program or project.
>
> "The structure of the Relocation Act confirms our conclusion that Congress did not expect to provide assistance for all persons somehow displaced by Government programs ...." (441 U.S. 59, 60) (Emphasis added.)

The Court below likened the situation of the utility to that of a tenant at will, saying:

> "HUD's reliance on the common law is unconvincing. The Act was intended to create rights that were not recognized at common law. A tenant at will, for example, can recover relocation expenses as a displaced person under the Act even though the common law recognized no such right. The plaintiff in this case is, in

> certain respects, similar to a tenant at will because it has a right to use the city's streets for its lines only at the will of the city." (App. A, p. A-5, 6)

The difference is that utilities are not contemplated or mentioned as beneficiaries under the Act, while tenants, including tenants at will, are expressly provided for in 42 U.S.C. §4624.

It is the province of the legislature, not the courts, to change the common law. This Court has affirmed this principle in several cases. In Shaw v. Merchants' National Bank of St. Louis, 101 U.S. 557, 25 L.Ed. 892, (1880) the Court said:

> "Any such rule of law, being in derogation of the common law, must be strictly construed, for no statute is to be construed as altering the common law, farther than its

> words import. It is not to be construed as making any innovation upon the common law which it does not fairly express." (Page 565).

In Fairfax's Devisee v. Hunters Lessee, 11 U.S. 603, 3 L.Ed. 453, (1812) the Court said:

> "The common law, therefore, ought not to be repealed, unless the language of a statute be clear and explicit for this purpose." (Page 622)

The 1972 amendment of the District of Columbia Redevelopment Act of 1945 was passed in order to provide reimbursement for the removal of distribution facilities by private utility companies. This is strongly indicative that the 1970 Uniform Relocation Act did not authorize such compensation. See, Erlenbaugh v. United

States, 409 U.S. 239, 34 L.Ed.2d. 446, 93 S.Ct. 477 (1972), where the Court said:

> "...a later act can...be regarded as a legislative interpretation of (an) earlier act...in the sense that it aids in ascertaining the meaning of words used in their contemporary setting, in resolving any ambiguities and doubts...The rule is but a logical extension of the principle that individual sections of a single statute should be construed together ...for it necessarily assumes that whenever Congress passes a new statute, it acts aware of all previous statutes on the same subject,...." (pp. 243-244)

3. THE DECISION BELOW WILL HAVE AND IMMEDIATE, UNFAIR AND NATIONWIDE EFFECT.

The various trade associations which coordinate information for the utility companies are aware of the decision of the Court of Appeals in

this case. Reports have already been received of instances where claims are for the first time being asserted by utilities for relocation benefits.[5] These claims can be very large, and the retroactive aspect of the decision invites a devastating effect.

The opinion below changed the meaning of the Uniform Relocation Act twelve years after its adoption and after countless local grant-in-aid contracts were in place. For example, in the instant case HUD has taken the position that the urban renewal projects are closed out and no additional funds are available to the locality to

5. Advice as to new claims based on the opinion of the Court of Appeals has been received from Boston, Massachusettes, San Marcos, Texas, Harrisburg, Pennsylvania, New Kensington, Pennsylvania, Pittsburg, California and Dover, New Jersey.

pay any award which might be made. This is but one illustration of the very substantial burden imposed upon localities by the decision below, as the claimed amount, if interest is allowed, will approximate a million dollars. This is not an unusual amount. The data assembled for Congress in support of the 1972 amendment to the District of Columbia Redevelopment Act of 1945 (PL 92-495) tabulated estimates of Utility Relocation and Abandonment Costs under urban renewal in the District of Columbia for the years 1972-1976 as follows:

C & P Telephone Company Company	$292,000.00
Potomac Electric Power Co.	370,000.00
Washington Gas Light Company	320,000.00
	$982,000.00

(See House Report 92-906, Committee on the District of Columbia, at page 8.)

Given the retroactive effect of the decision below, there is no way to estimate accurately the size and number of potential claims or to avoid duplication of payment of these costs of removal. Rates for utilities have been set by state regulatory commissions upon application by the utilities after all cost data (including the cost of removing distribution lines) is assembled. There is no way for the rate payers to be reimbursed for the funds which they have paid to the utility companies to carry the anticipated and actual costs of removing these distribution facilities. Thus the impact of the decision will be to penalize the program funding for countless cities which could not budget for these expenses and to compensate twice the utilities which have

no effective way of returning the money to their customers.

The brunt of this decision is not upon the federal government, but upon cities and local agencies across the land. Federal funds are finite and grant authorization is being reduced wherever possible. Thus, there are but a given number of federal dollars. Prior to this opinion these dollars were not diluted by providing this reimbursement to the utility companies. If the decision stands, the same number of federal dollars will be available, but the localities will be able to do less because of this added expense. If this is a desirable change, it should emanate from the legislature, which can balance equities, give advance notice of the change to prevent unjust enrichment

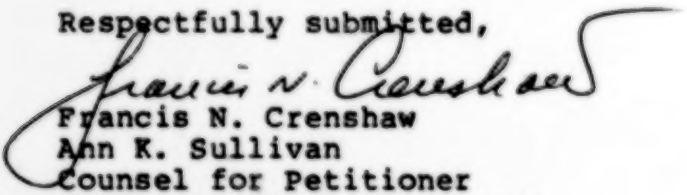
and avoid the harshness of unanticipated retroactivity.

CONCLUSION

The decision of the Circuit Court of Appeals for the Fourth Circuit interprets an important federal statute with national impact. The decision upsets historic funding processes followed by units of local government across the country. It departs from the usual and accepted course of judicial determination of issues, by making an unwarranted change in the common law. It imposes a financial burden on localities for which they cannot budget and did not anticipate.

Finally it provides a windfall for the utilities. A writ of certiorari should be granted.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that on this 22nd day of June, 1982, three copies of the foregoing Petition for Writ of Certiorari were mailed, postage prepaid to each of the following:

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I further certify that all parties required to be served have been served.

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UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 81-1602

The Chesapeake and Potomac
Telephone Company of Virginia,

Appellant,

versus

Moon Landrieu, in his official
capacity as Secretary of Housing
and Urban Development,

and

Norfolk Redevelopment and
Housing Authority,

Appellees.

Appeal from the United States District Court for the Eastern District of Virginia, at Norfolk. John A. MacKenzie, District Judge.

Argued December 7, 1981

Decided March 25, 1982

Before HAYNSWORTH, Senior Circuit Judge, RUSSELL and WIDENER, Circuit Judges.

Joseph L. Kelly, Jack E. Greer (Williams, Worrell, Kelly and Greer on brief) for Appellant; Francis N. Crenshaw (Ann K. Sullivan, Crenshaw, Ware & Johnson; Justin W. Williams, United States Attorney, Michael L. Rhine, Assistant United States Attorney; Sonia C. Jaipaul, John R. Abbot, Peter M. Campanella on brief) for Appellees.

HAYNSWORTH, Senior Circuit Judge:

The questions are whether a utility company can qualify as a "displaced person" under the Uniform Relocation Assistance and Real Property Acquisition Policies Act, 84 Stat. 1894, 42 U.S.C. §4601 et seq., and whether the plaintiff, Chesapeake & Potomac Telephone Company (C&P), qualifies as a "displaced person" under the facts of this case.

The Department of Housing and Urban Development (HUD) provided funds for the Norfolk Redevelopment and Housing Authority (NRHA) to carry out certain redevelopment projects in Norfolk, Virginia. In

order to carry out these projects NRHA acquired title to certain blighted areas in Norfolk. Because of these projects, C&P was forced to move certain of its telephone lines, cables, conduits, poles and related equipment from what had been streets in Norfolk. Under C&P's franchise agreement with the City of Norfolk, C&P was required to move its lines from public rights-of-way whenever requested by the city to do so.

After moving its lines, C&P requested relocation benefits under the Uniform Relocation Act. C&P's claims were denied at the administrative level. C&P then brought this action in the district court against the Secretary of HUD and NRHA.

After a trial on the liability issue, the district court determined that Congress did not intend for utilities to qualify as displaced persons under the Act. The plaintiff appeals from this order.

I.

The Uniform Relocation Act defines "displaced person" as "any person who... moves... as a result of the acquisition of... real property... for a program or project undertaken by a Federal agency, or with Federal financial assistance...." 42 U.S.C. §4601(6). "Person" is defined as "any individual, partnership, corporation or association." 42 U.S.C. §4601 (5). "Business" is defined as "any lawful activity, excepting a farm operation, conducted primarily - - (A) for the purchase, sale, lease and rental of personal and real property, and for the manufacture, processing, or marketing of products, commodities, or any other personal property; (B) for the sale of services to the public...." 42 U.S.C. §4601(7). Under 42 U.S.C. §4622(a) "displaced persons" are entitled to recover from the government any reasonable expenses incurred in moving

personal property, and a business required to move is a displaced person.

The plaintiff argues that it is a business within the meaning of the Act and thus is entitled to claim reimbursement for expenses as a displaced person. NRHA and HUD argue, however, that the Act was not intended to apply to utilities. HUD bases its argument on the settled common law principle that utilities are not entitled to reimbursement for expenses incurred in moving lines when cities close streets. Because the Act does not explicitly mention utilities as parties that can receive benefits under the Act, and because the legislative history of the Act makes no mention of utilities, HUD argues that the Act was not intended to change the common law. We disagree.

HUD's reliance on the common law is unconvincing. The Act was intended to create rights that were not recognized at

common law. A tenant at will, for example, can recover relocation expenses as a displaced person under the Act even though the common law recognized no such right. The plaintiff in this case is, in certain respects, similar to a tenant at will because it has a right to use the city's streets for its lines only at the will of the city.

Congress' failure to mention utilities during the debates on the Act and in the legislative history of the Act also provides little reason to exclude utilities from the Act's coverage. In Alexander v. United States Department of Housing and Urban Development, 441 U.S. 39, 51 (1979), the Supreme Court noted that the original "Declaration of Policy" in S.1, 91st Cong., 1st Sess. §201(1969), the bill finally enacted as the Uniform Relocation Act, stated that the purpose of the legislation was

> "to establish a uniform policy for the fair and equitable treatment of owners, tenants, and others displaced by the acquisition of real property in Federal and federally assisted programs to the end that such person shall not suffer disproportionate injuries as a result of programs designed for the benefit of the public as a whole."

Similar language is contained in the House Report, H.R. 91-1656 (1970). Thus the Act was intended to extend benefits uniformly to persons who are displaced by federal acquisitions of real property for federal programs. Exclusion of utilities from the Act's coverage would run counter to that purpose.

In the absence of any clear legislative intent to exclude utilities, it is this court's duty to apply the literal language of the statute. Doing so, we find that a utility comes within the Act's definition of "business" and thus

is a "displaced person" under the Act.

II.

HUD contends that the removal of its lines by C&P was not the result of federal acquisition of the real estate. It says that the removal was required by the city's closure of the streets.

Under the statute, relocation expenses are payable if the removal was required "as a result of the acquisition of... real property, in whole or in part..., for a program or project undertaken by a Federal agency, or with Federal financial assistance...." It is true that the city closed the streets, but the removal seems clearly to have been required as a result of the federal acquisition of the real estate.

With respect to most of the relocation costs incurred by C&P, they occurred in situations in which NRHA acquired the land abutting both sides of streets. As

a result of those acquisitions, the project became the owner of the title in fee simple to the land underlying the streets, subject to the city's easement to maintain them as public ways. At the request of NRHA, the city then released its easements so that NRHA became the owner of the land formerly dedicated to use as streets without the burden of that servitude. While in a very technical sense it may have been the city that closed the streets, the city was acting at the direction or request of HUD and NRHA. It was an essential part of the plan of the project that the land occupied by the streets to be closed be acquired free of the city's easement so that such land could be incorporated in the redevelopment plan to the same extent as lands acquired, by purchase or condemnation, from private owners. It was the federal acquisition of the streets, an integral part of the redevelopment plan,

which required removal of C&P's lines.

Some of the removal expense was incurred with respect to lines in streets that were to be widened and other streets which were only partially closed. The record is not sufficient to permit us to decide whether those expenses resulted in whole or in part from the federal acquisition. This should be the subject of further consideration on remand.

III.

Under 42 U.S.C. §4622(a), it is the expense of removal of personal property which is reimbursable, and HUD contends that the utility lines were realty. Its regulations require that what is personal property be determined according to the law of the state in which the property is located,[1] and it relies upon Transcontinental Gas Pipe Line v. Prince William County, 210 Va. 550, 555, 172 S.E.2d 757,

1. 24 C.F.R. §42.40(m)(2).

761-62(1970).

In Transcontinental, gas pipe lines had been installed in land in which Transcontinental had a perpetual easement for the placement, maintenance and operation of the gas line. The easement was unquestionably real property, belonging to the owner of the lines. Under those circumstances, the Virginia Supreme Court held that the gas lines themselves were real estate belonging to Transcontinental. In so doing, it held that the question whether a chattel annexed to real estate has been converted into a fixture principally depends upon the intention of the party making the annexation.

C&P, in placing its lines, could hardly have intended them to become so annexed to real estate belonging to others that the lines themselves became the real property of those other owners. Clearly it intended to maintain ownership and control of these lines which were not

annexed to any real estate owned by C&P of which they might have become a part. Indeed, everyone recognized C&P's right of removal of property which could only have been its personalty.

In similar situations in which a utility's facilities were installed or attached to real estate belonging to others, state courts have found that the facilities remained personal property. See Bangor-Hydro Electric v. Johnson, 226 A.2d 371 (Me. 1967); United Electric Light v. Deliso Const. Co., 52 N.E.2d 353 (Mass. 1943).

HUD and NRHA, however, point to a letter that C&P wrote to the Virginia Commissioner of Revenue requesting that its property be taxed as real property. That it wished its facilities to be treated for purposes of ad valorem taxation as if they were realty is not inconsistent with an intention at the time of

installation that the facilities remain its personal property subject to its control and possible removal. Indeed, if the facilities had become part of the real estate to which they were attached, C&P should have been subject to no ad valorem taxation upon them, for they would not have been the property of C&P.

This result is consistent with the purpose of the personal property limitation. The former owners of land acquired for the redevelopment project are compensated through a purchase agreement or a condemnation proceeding. By agreement, there might be a severance of a fixture and its reconversion to personalty, but once real estate has been sold and paid for, it is no longer subject to removal by the former owner. The Act thus contemplates no reimbursement of expense in connection with the removal of non-removable real estate. It is limited to the expense

of removal of personal property, for the owner is not otherwise compensated for that expense. There is no possibility of double compensation here, for C&P did not sell any land, and it received no compensation through any sale or condemnation.

IV.

We reverse and remand this case for further proceedings consistent with this opinion.

REVERSED AND REMANDED

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 81-1602

The Chesapeake and Potomac
Telephone Company of Virginia,

Appellant,

versus

Moon Landrieu, in his official
capacity as Secretary of Housing
and Urban Development,

and

Norfolk Redevelopment
and Housing Authority,

Appellees.

Appeal from the United States District Court for the Eastern District of Virginia, at Norfolk. John A. MacKenzie, District Judge.

Upon motion of the appellees, by counsel and for cause shown,

IT IS ORDERED that the mandate in the above-entitled case be, and it is

hereby, stayed pending application of the appellees in the Supreme Court of the United States for a writ of certiorari to this court. The stay shall not exceed thirty (30) days unless the period is extended for cause shown.

For the Court-by Direction.

/s/ William K. Slate, II
Clerk

Entered: April 22, 1982

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 81-1602

The Chesapeake and Potomac Telephone Company of Virginia,

Appellant,

versus

Moon Landrieu, in his official capacity as Secretary of Housing and Urban Development,

and

Norfolk Redevelopment and Housing Authority,

Appellees.

Appeal from the United States District Court for the Eastern District of Virginia, at Norfolk. John A. MacKenzie, District Judge.

Upon motion of the appellees, by counsel and for cause shown,

IT IS ORDERED that the mandate in the above entitled case be, and it is

hereby, stayed for an additional 30 days to and including, June 21, 1982, pending application of the appellees in the Supreme Court of the United States for a writ of certiorari to this Court.

For the Court-by Direction.

/s/ William K. Slate, II

Entered: May 22, 1982

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Norfolk Division

THE CHESAPEAKE AND POTOMAC
TELEPHONE COMPANY OF VIRGINIA,

Plaintiff

v.

CIVIL
ACTION
NO. 79-906-N

MOON LANDRIEU, ETC., and
NORFOLK REDEVELOPMENT AND
HOUSING AUTHORITY,

Defendants

MEMORANDUM OPINION

The Chesapeake and Potomac Telephone Company of Virginia ("Telephone Company") here sues the Secretary of Housing and Urban Development ("HUD") and Norfolk Redevelopment and Housing Authority ("NRHA"), seeking reimbursement for the relocation of its telephone lines, cables, conduits, poles, and related equipment in

four federally-aided redevelopment projects in the City of Norfolk, Virginia. The central issue is the applicability of the provisions of the Federal Relocation Assistance Act, also known as the Uniform Relocation Act of 1970 ("URA"), 42 U.S.C. §§4601 et seq. The Virginia Legislature has adopted an enabling act to bring Virginia localities under the umbrella of the federal Uniform Relocation Act. See, §§25-235 et seq., Code of Virginia.

It is stipulated that the defendant NRHA acquired title to certain blighted areas in Norfolk for the purpose of redevelopment projects; that the land so acquired included streets in which the Telephone Company's lines and conduits were located; and that in the redevelopment of the areas the Telephone Company was required to relocate its utility equipment in accordance with the plan established for the redevelopment of

each pertinent area.

The statutes relied upon in the Telephone Company complaint are part of the Federal Relocation Assistance Act, 42 U.S.C. §§4601, 4622 and 4637, and read as follows:

> "4622. (a) Whenever the acquisition of real property for a program or a project...will result in the displacement of any person...the head of such agency shall make a payment to any displaced person...for - (1) actual reasonable expenses in moving himself, his family, business, farm operation or other personal property; (2) actual direct losses of tangible personal property as a result of moving or discontinuing a business or farm operation, but not to exceed an amount equal to the reasonable expenses that would have been required to relocate such property....
>
> "§4601. Definitions. As used in this chapter -
>
> (5) The term 'person' means any individual, partnership, corporation or association.

> (6) The term 'displaced person' means any person who...moves from real property, or moves his personal property from real property as a result of the acquisition of such real estate, in whole or in part, or as a result of the written order of the acquiring agency to vacate such real property, for a program or a project ....
>
> (7) The term 'business' means any lawful activity, excepting a farm operation conducted primarily -
>
> (a) for the sale of services to the public....
>
> "§4637. A person who moves or discontinues his business, or moves other personal property...as a direct result of any project or program...shall...be deemed to have been displaced as a result of the acquisition of real property."

HUD and NRHA, defendants, deny that the Uniform Relocation Assistance Act includes public utilities such as the Telephone Company or that the statutes are to be given the broad reading necessary to encompass the plaintiff's claim.

Concluding that utilities are not

included under the Uniform Relocation Act of 1970, we DENY the Telephone Company's request for reimbursement thereunder.

I

In the litigation of situations reasonably akin factually to those presented here, courts have been unanimous in denying such utility relocation claims. Consumer Power Company v. Costle, 615 F.2d 1147 (6th Cir. 1980), held that relocation benefit for a gas main which had to be relocated in a new right-of-way in a redevelopment project was denied; Pacific Telephone and Telegraph v. Redevelopment Agency of Glendale, 151 Cal. Rptr. 68, 87 Cal. App. 3d 296 (1978), under a State Act of the same language as the federal Relocation Act, the court found that a public utility accepts franchise rights

in public streets subject to an implied obligation to relocate those facilities at its own expense when necessary to make way for a redevelopment project relieving urban blight. Artesian Water Co. v. State Department of Highways and Transportation, 330 A.2d 432 (Del. 1974), held that the Uniform Relocation Act was not intended to extend coverage to include utilities within its definition of displaced persons or businesses. Mountain States Telephone and Telegraph Company v. Boise Redevelopment Agency, 607 P.2d 1084, 101 Idaho 30 (1980), stated that the overwhelming view in this country is that public utilities are not entitled to relocation costs incurred in making way for governmentally sponsored projects and the Uniform Relocation Act does not change this common law rule. To like effect, Public Service Company of Oklahoma v. Harris, No. 79-C-37-3T (N.D. Okla, August 22, 1980);

Lone Star Gas Company, etc. v. Moon Landrieu, No. 80-100-C (E.D. Okla., March 30, 1981).

These cases are ample authority, upon almost identical factual situations and with the same state and federal statutory overview that a private utility company is not a beneficiary for relocation expenses under the Uniform Relocation Act of 1970.

II

The common law has long been fully developed that utilities, shielded from competition by a franchise, accept their right to install utility lines in public rights-of-way thoroughly cognizant of their obligation to relocate such lines upon demand at no cost to the City, County or State. No authority for this obligation need be cited.

In Virginia during the period of the conception of the Uniform Relocation Act, the mid-1960's, relocation costs of utility lines, particularly in the expansion of highways, raised a real furor of intense and vocal interest both to the utilities attempting to collect reimbursement and to the Virginia Highway Department in its disclaimer of liability for such costs. Potomac Electric Power Company v. Fugate, 275 F.Supp. 566 (E.D. Va. 1967); PEPCO v. Highway Commissioner, 211 Va. 745, 180 S.E.2d 657 (1971); Potomac Power Electric Power Company v. Fugate, 341 F.Supp. 887 (1972); Potomac Elec. Power Co. v. Fugate, 574, F.2d 1163 (4th Cir. 1978). This contest was and is part of the public record and was prominently and contemporaneously in the foreground while passage of the relocation Act of 1970 was before Congress.

In the adoption of the Uniform Relocation Act of 1970 if Congress chose to abrogate such a well known common law principal, it would certainly have included in that legislation a clear affirmative statement of that revocation. Instead, no such reversal of the common law concept appears in the language of the Act nor its legislative notes and history. So also, in light of then ongoing litigation over relocation costs, had it been the intent of Congress to reimburse utilities for relocation costs in redevelopment projects, it appears that such intent most certainly would have been specifically stated in light of the fact that Congress had passed a special statute, the Federal Highway Aid Act in 1958, to give such relief to utilities relocating lines to accommodate the interstate highway system.

Lastly, public utilities retrieve their operating costs and the reasonable return on their investment from the general public in their franchise area through rates that are structured to accommodate costs and expenses. No other "persons," "corporations," or "displaced persons," except utilities are so protected by a franchise with a non-competitive market area.

The language of the Supreme Court in Alexander v. U.S. Dept. of HUD, 441 U.S. 39 (1979), indicates the thoroughness of the discussion of the Relocation Act before both the House of Representatives and the Senate Committee. Apparently, many witnesses appeared seeking to enlarge the umbrella of reimbursement to many classes of "displaced persons." No mention is made of any appearances before the Committees of Congress by utility representatives. In the end, as Alexander pro-

claims, the extension of relocation assistance was limited to a fairly narrow group and did not include utilities.

> "The structure of the Relocation Act confirms our conclusion that Congress did not expect to provide assistance for all persons somehow displaced by Government programs." Alexander, supra at page 60.

We believe that it is those unprotected, unfranchised corporations and persons which were contemplated by Congress under the Uniform Relocation Act. A utility company, C & P Telephone Company, serving these redeveloped areas under its franchise is not called upon to compete. Its rates are established by petitions to the State Corporation Commission which takes into consideration the accounting data essential to the life of the utility and fixes a rate to cover its costs and expenses. On the other hand, a Mom and Pop business, a grocery store, a retail

furniture outlet, for instance, which is subjected to the sudden trauma of being forced to relocate elsewhere must do so under competitive conditions in which it cannot realistically raise the price of its products to cover extraordinary relocation costs. It must compete in the market place against competitors beyond the redeveloped area who have no such cost to recoup. These are the "persons," "businesses," "displaced persons," to which the Uniform Relocation Assistance Act extends its largesse.

For the reasons herein stated, the plaintiff's prayer for relief is DENIED.

/s/ John A. MacKenzie
United States District Judge

Norfolk, Virginia
June 4, 1981.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Norfolk Division

THE CHESAPEAKE AND POTOMAC
TELEPHONE COMPANY OF VIRGINIA,

Plaintiff

v.

CIVIL
ACTION
NO. 79-906-N

MOON LANDRIEU, ETC., and
NORFOLK REDEVELOPMENT AND
HOUSING AUTHORITY,

Defendants

ORDER

In accordance with a Memorandum Opinion filed this date, the plaintiff's prayer for relief is DENIED.

/s/ John A. MacKenzie
United States District Judge

Norfolk, Virginia
June 4, 1981.

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

***

MOUNTAIN STATES TELEPHONE AND TELEGRAPH COMPANY, a corporation; BOISE WATER CORPORATION, a corporation; and IDAHO POWER COMPANY, a corporation,

Plaintiffs,

Case No. 52891

vs.

MEMORANDUM DECISION

BOISE REDEVELOPMENT AGENCY,

Defendant.

APPEARANCES:

For the Plaintiff: WARREN E. JONES & MARK S. GESTON, Eberle, Berlin, Kading, Turnbow & Gillespie

For the Defendant: GARY D. BABBITT Hawley, Troxell, Ennis & Hawley

***

This matter involving the plaintiffs' claims for relocation costs reimbursement against the Boise Redevelopment Agency is

before the district court upon remand from the Idaho Supreme Court. In Mountain States Tel. & Tel. Co., et al v. Boise Redevelopment Agency, 101 Idaho 39, 607 P.2d 1085 (1980) the Court held that as a matter of state law, the plaintiffs herein were not entitled to reimbursement for the costs of relocating their respective utility equipment even though the changes were precipitated and necessitated by the defendant's planned redevelopment of downtown Boise. The Court remanded the case for determination of the plaintiff's rights to reimbursement under the federal Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, 42 U.S.C.A., Sec. 4601 et seq. (hereinafter "U.R.A.").

The Supreme Court's opinion and the briefs of the parties set forth the complete history of this matter. The original

district court decision was based upon a Stipulation of Facts submitted by the parties. On remand, the same Stipulation of Facts is offered in support of the plaintiff's present motion for summary judgment.

The Supreme Court's opinion unequivocally explained that at common law, public utilities must relocate at their own expense unless otherwise provided by express statutory language. This is so because the utilities place their equipment permissively, at the convenience of the public, and do not acquire any permanent property interest in the site of the location of their equipment. See State v. Idaho Power Co., 81 Idaho 487, 346 P.2d 596 (1959). The Court acknowledged that while Idaho Code Sec. 50-2007(h) and 50-2018(j)(3) of the Idaho Urban Renewal Act would have

permitted the Boise Redevelopment Agency (BRA) to reimburse the utilities in this situation, such action by the B.R.A. was not made mandatory by State statute. In view of the strong common law position in Idaho, vis-a-vis the existing non-mandatory statutory provisions, the Supreme Court concluded that the plaintiffs were not entitled to relief under state law.

The Federal relocation assistance statutory scheme is however, couched in substantially different language and plaintiffs urge that they are clearly entitled to relief thereunder.

The U.R.A. was enacted in 1970 accompanied by this brief declaration of policy:

> "The purpose of this title (42 USCA Sec. 4621-4638) is to establish a uniform policy for the fair and equitable treatment of persons displaced as a result of Federal and federally assisted pro-

> grams in order that such persons shall not suffer disproportionate injuries as a result of programs designed for the benefit of the public as a whole." 42 USCA Sec. 4621.

A far more comprehensive discussion of the policy underlying the Act is found in its legislative history published in House Report No. 91-1656.

> "The Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 is the culmination of lengthy and extensive efforts to develop legislation establishing a uniform policy for the fair and equitable treatment of persons who are displaced, or have their real property taken for Federal and federally assisted programs. The need for such legislation arises from the increasing impact of Federal and federally assisted programs as such programs have evolved to meet the needs of a growing and increasingly urban population. In a less complex time, Federal and federally assisted public works projects seldom involved major displacements of people. There was relatively little

taking of residential or commercial property for farm-to-market routes or for reservoirs or public buildings. Indeed, local support for such projects often resulted in little, if any, cost for land acquisition or rights-of-way. However, with the growth and development of an economy which is increasingly urban and metropolitan, the demand for public facilities and services has increasingly centered on such urban areas, and the acquisition of land for such projects has become the most difficult facet of many undertakings by public agencies. Also, a major public project--be it a highway, urban renewal project, or hospital--inevitably involves the acquisition and clearance of sites which now provide residential, commercial, or other services. As the thrust of Federal and federally assisted programs have shifted from rural to urban situations, it became increasingly apparent that the application of traditional concepts of valuation and eminent domain resulted in inequitable treatment for large numbers of people displaced by public action. When applied to densely populated urban areas, with already limited housing, the

result can be catastrophic for those whose homes or businesses must give way to public needs. The result far too often has been that a few citizens have been called upon to bear the burden of meeting public needs.

* * * * * * * * * * * * * * * * *

The bill as recommended is necessary to eliminate the great inconsistencies that exist among Federal and federally assisted programs with respect to the amount and scope of payments, other assistance provided, and assurance of housing offered. It recognizes that relocation is a serious and growing problem in the United States and that the pace of displacement will accelerate in the years immediately ahead. It recognizes that advisory assistance is of special importance in the relocation process especially for the poor, the nonwhite, the elderly, and people engaged in small business. It recognizes the need for more equitable land acquisition policies in connection with the acquisition of real property for these programs. In short, this legislation recognizes that the Federal Government has a primary responsi-

bility to provide uniform treatment for those forced to relocate by Federal and federally aided public improvement programs and to ease the impact of such forced moves.

This legislation refines and strengthens the basic principles and programs in S. 1. as passed by the Senate. It provides a humanitarian program of relocation payments, advisory assistance, assurance that comparable, decent, safe, and sanitary replacement housing will be available for displaced persons prior to displacement, economic adjustments, and other assistance to owners and tenants displaced from their homes, farms, and places of business. It establishes a uniform policy on real property acquisition practice for all Federal and federally assisted programs. And, perhaps most important of all, it gets to the heart of the dislocation problem by providing the means for positive action to increase the available housing supply for displaced low and moderate income families and individuals.

Each element of the reported bill is discussed in some detail in the section-by-section explanation that follows in this report.

The committee believes that this bill as reported provides for relief of the economic dislocation which occurs in the acquisition of real property for Federal and federally assisted programs. The tools in the reported bill are adequate to deal with the problem. The Congress, however, can only provide such tools. Their effective use depends upon the attitudes and skill of the officials in the executive branch of the Government responsible for their administration. The principle of adequate housing, for example, will by the reported bill, but also imagination, ingenuity, and a desire on the part of its administrators to translate this authorization into equitable and satisfactory conditions for the people affected. It is the committee's intention to review the implementation of this legislation periodically with special emphasis on its impact on displaced persons.

This bill, as reported, is reported unanimously. It is a comprehensive effort to provide equitably for all persons affected by Federal and federally assisted programs." 1970 U.S. Code Congressional and Admin. News, pg. 5850-52.

The operative sections of the U.R.A. in the instant matter are set forth in part in Title 42, U.S.C., Sec. 4622 which provides, inter alia:

> "Sec. 4622. Moving and related expenses
> (a) General provision. Whenever the acquisition of real property for a program or project undertaken by a Federal agency in any State will result in the displacement of any person on or after the effective date of this Act (Jan. 2, 1971), the head of such agency shall make a payment to any displaced person, upon proper application as approved by such agency head, for--
> (1) actual reasonable expenses in moving himself, his family, business, farm operation, or other personal property;
> (2) actual direct losses of tangible personal property as a result of moving or discontinuing a business or farm operation, but not to exceed an amount equal to the reasonable expenses that would have been required to relocate such property, as determined by the head of the agency; and
> (3) actual reasonable expenses in searching for a replacement business or farm.

* * * * * * * * * * * * * *

(c) Displacement from business or farm operation -- Election of payments--Limitations--Eligibility for business payments--'Average annual net earnings' defined. Any displaced person eligible for payments under subsection (a) of this section who is displaced from his place of business or from his farm operation and who elects to accept the payment authorized by this subsection in lieu of the payment authorized by subsection (a) of this section, may receive a fixed payment in an amount equal to the average annual net earnings of the business or farm operation, except that such payment shall be not less than $2,500 nor more than $10,000. In the case of a business no payment shall be made under this subsection unless the head of the Federal agency is satisfied that the business (1) cannot be relocated without a substantial loss of its existing patronage, and (2) is not a part of a commercial enterprise having at least one other establishment not being acquired by the United States, which is engaged in the same or similar business. For purposes of this subsection, the term 'average annual net earnings' means one-half of any net earnings of the business or

farm operation, before Federal, State, and local income taxes, during the two taxable years immediately preceding the taxable year in which such business or farm operation moves from the real property acquired for such project, or during such other period as the head of such agency determines to be more equitable for establishing such earnings, and includes any compensation paid by the business or farm operation to the owner, his spouse, or his dependents during such period." (Emphasis supplied.)

Title 42 U.S.C. Sec. 4630 also provides in part:

"4630. Requirements for relocation payments and assistance of Federally assisted program--Assurances of availability of housing

Notwithstanding any other law, the head of a Federal agency shall not approve any grant to, or contract or agreement with, a State agency under which Federal financial assistance will be available to pay all or part of the cost of any program or project which will result in the displacement of any person on or after the effective date of this title (Jan. 2, 1971), unless he receives satisfactory assurances from such State agency that--

> (1) fair and reasonable relocation payments and assistance shall be provided to or for displaced persons, as are required to be provided by a Federal agency under sections 202, 203, and 204 (42 USCS Sec. 4622-4624) of this title;
> (2) relocation assistance programs offering the services described in section 205 (42 USCS Sec. 4625) shall be provided to such displaced persons;"

The parties do not dispute that the B.R.A. is a "state agency" pursuant to Sec. 4630, receiving federal financial assistance for its planned project. The genuine issue is whether or not the plaintiffs are persons who have been displaced by the B.R.A.'s acquisition of real property and are therefore entitled to relocation assistance benefits under the Act.

Title 42 U.S.C. Sec. 4601 provides definitions for the above-noted terms in Sec. 4622. A "person" is defined in subparagraph (5) as "any individual, partnership, corporation, or association."

The term "business" includes any lawful activity conducted primarily for the sale of services to the public. Finally, subparagraph (6) defines the term "displaced person" as:

> "any person who, on or after the effective date of this Act (Jan. 2, 1971), moves from real property, or moves his personal property from real property, as a result of the acquisition of such real property, in whole or in part, or as the result of the written order of the acquiring agency to vacate real property, for a program or project undertaken by a Federal agency, or with Federal financial assistance; and solely for the purposes of sections 202(a) and (b) and 205 of this title (42 USCS Sec. 4622(a), (b), 4625), as a result of the acquisition of or as the result of the written order of the acquiring agency to vacate other real property, on which such person conducts a business or farm operation, for such program or project."

The defendant's fundamental position is that the U.R.A. was created to provide supplemental benefits only to persons who

were being subjected to an exercise of the acquiring agency's power of eminent domain. Traditionally, an exercise of eminent domain compensates a property owner only for the value of his property on the date of condemnation. U.S. v. 3969.59 Acres of Land, 56 F.Supp. 831 (D. Idaho 1944). Thereafter, the property owner is left to relocate his home or business at his own expense and aggravation. The defendants argue that the U.R.A. was meant to assist such persons and thereby substantially relieve them from bearing an excessive individual burden caused by a project planned for the benefit of the greater public. It is therefore defendant's conclusion that, inasmuch as common law dictates that public utilities are not subject to the exercise of eminent domain but rather must move their equipment pursuant to an authorized

use of police power without compensation, the U.R.A. was not intended to benefit the plaintiffs. The defendants rely on the case of Consumers Power Co. v. Costle, 468 F.Supp. 375, aff'd, 615 F.2d 1147 (1979) to support their position.

The plaintiffs' interpretation of the overall purpose of the U.R.A. is that it was fashioned as a comprehensive and new form of relief wholly independent of a displaced person's entitlement to compensation under the law of eminent domain. In other words, plaintiffs claim that they are entitled to relocation benefits under the Act despite the fact that they have no right to compensation that is dependent upon or parasitic to a right in eminent domain proceedings. They contend that so long as they fit under the definition of "displaced person", they deserve reimbursement for their equipment

relocation expenses.

Counsel have provided the Court with extremely thorough briefs containing their respective arguments and the unfortunately severly limited precedents which are available. Faced with this state of affairs, the parties have necessarily resorted to refined analysis of several of the conceptual wordings found within the Sec. 4601 definitions above-stated such as "personal property" and "acquisition of real property" in efforts to support their positions. The Court finds that these approaches are not particularly persuasive nor are any of the authorities presented absolutely determinative of the singular issue in the instant matter. While the Costle case, supra, most nearly approaches the issues raised in this action, this Court would be uncomfortable in adopting the syllogism by which

that court arrived at its conclusion. Instead, the Court finds it necessary to blend several considerations from the available case law with pertinent principles of statutory construction in arriving at a conclusion.

A most perplexing aspect of this case is the omission of even a casual reference to the plight of public utilities in either the text of the Act or in its exhaustive legislative history. This omission seems inexplicable in view of the fact that we are informed that the U.R.A. was expressly devised to take into consideration the disruption anticipated by federally assisted projects in urban areas where the presence of utilities is absolutely foreseeable! The parties have skillfully attempted to bolster their respective positions based upon the "logical" inferences to be drawn

from Congress' failure to specifically address this situation.

As a practical matter, it is likely that the preponderance of persons affected by the U.R.A. are indeed persons who would also be entitled to "just compensation" from the project agency under the law of eminent domain. However, it is clear that U.S.C. 42 Sec. 4624, pertaining to lessees and tenants, aims to provide the relocating assistance benefits to displaced persons who have no rights to compensation in the law of eminent domain. To this extent, it is apparent that the defendant's contention that the U.R.A. was intended purely to supplement benefits enuring to those entitled to compensation in eminent domain proceedings, is not absolutely correct. If the defendant is correct about Congress' intent, then a clear exception was created in 42 U.S.C. Sec. 4624.

The case of Pacific Tel. & Tel. Co. v. Redevelopment Agency of the City of Glendale, 151 Cal.Rptr. 68, 87 Cal.App. 3d 299 (1978) involved a determination of a public utility's right to reimbursement under the California Relocation Assistance Law. This statutory scheme contains definitions of "person", "business" and "displaced person" that are essentially identical to those found at Sec. 4601 of the U.R.A. In that case, the telephone company was forced to relocate its equipment from a public street which, as in the case at bar, had been vacated to make way for a re-development project. The Court first explained that California followed the common law view with respect to refusing to reimburse utilities for the costs of relocating their equipment but noted that the state legislature had on several occasions created clear exceptions for the benefit of utilities in this area.

The telephone company contended that it fell within the definitions prescribed in the California Relocation Assistance Law and that since no provision of that Act specifically excluded reimbursement of utility relocation costs, the legislature intended to include utilities in its broadly drawn definitions. The Court held that in view of the State legislature's historical record of having carved out specific exceptions to the common law rule, the failure of the legislature to specifically provide for utilities reimbursement in the Relocation Law argued forcefully and conclusively against the utility's position. The Court stated:

> "Whether the costs of such relocation should be shifted from the utility's rate payers to other taxpayers is a matter of policy for the Legislature to determine. (Pacific Tel. & Tel. Co. v. Redevelopment Agency, supra, 75 Cal.App.3d

> at pg. 968, 142 Cal.Rptr. 584, A Study Relating to Sovereign Immunity, supra, 5 Cal. Law Revision Com.Rep., p. 80; Van Alstyne, Taking or Damaging by Police Power: The Search For Inverse Condemnation Criteria, 44 So. Cal.L.Rev. 1, 53-56 (1971); Note, 6 UCLA L.Rev. 336, 338 (1959).) The Legislature has not so shifted the burden in the relocation assistance law." 151 Cal.Rptr. at pg. 70.

The overwhelming common law view in this country is that public utilities are not entitled to reimbursement for costs incurred while relocating its equipment to make way for governmentally sponsored projects. The U.R.A., if it is held to reverse this well-established rule, is to be regarded as a statute in complete derogation of common law.

> "Unless clearly so stated and apparently and evidently so intended, a statute will not be construed to have changed common law." Mason v. Hillsdale Hwy. Dist., 65 Idaho 833, 154 P.2d 490 (1945).

Given the stated intent of Congress to unify and coordinate the various federal relocation assistance programs, the state of the common law, and the consequent failure of Congress to clearly provide for the needs of the public utilities in their relocation requirements, it is the opinion of this Court that the U.R.A. was not intended to include with its coverage the reimbursements sought by the plaintiffs in this action.

Summary judgment is therefore granted in favor of the defendant.

IT IS SO ORDERED.

Dated this 27th day of October, 1980.

/s/ Jesse R. Walters
Jesse R. Walters
District Judge

PERTINENT PROVISIONS OF THE UNIFORM RELOCATION ASSISTANCE AND REAL PROPERTY ACQUISITION POLICIES ACT OF 1970

§4601. Definitions

As used in this chapter --

(1) The term "Federal agency" means any department, agency, or instrumentality in the executive branch of the Government (except the National Capital Housing Authority), any wholly owned Government corporation (except the District of Columbia Redevelopment Land Agency), and the Architect of the Capitol, the Federal Reserve banks and branches thereof.

(2) The term "State" means any of the several States of the United States, the District of Columbia, the Commonwealth of Puerto Rico, any territory or possession of the United States, the Trust Territory of the Pacific Islands, and any political subdivision thereof.

(3) The term "State agency" means the National Capital Housing Authority, the District of Columbia Redevelopment Land Agency, and any department, agency, or instrumentality of a State or of a political subdivision of a State, or any department, agency, or instrumentality of two or more States or of two or more political subdivisions of a State or States.

(4) The term "Federal financial assistance" means a grant, loan, or

contribution provided by the United States, except any Federal guarantee or insurance and any annual payment or capital loan to the District of Columbia.

(5) The term "person" means any individual, partnership, corporation, or association.

(6) The term "displaced person" means any person who, on or after January 2, 1971, moves from real property, or moves his personal property from real property, as a result of the acquisition of such real property, in whole or in part, or as the result of the written order of the acquiring agency to vacate real property, for a program or project undertaken by a Federal agency, or with Federal financial assistance; and solely for the purposes of sections 4622(a) and (b) and 4625 of this title, as a result of the acquisition of or as the result of the written order of the acquiring agency to vacate other real property, on which such person conducts a business or farm operation, for such program or project.

(7) The term "business" means any lawful activity, excepting a farm operation, conducted primarily--

(A) for the purchase, sale, lease and rental of personal and real property, and for the manufacture, processing, or marketing of products, commodities, or any other personal property;

(B) for the sale of services to the public;

(C) by a nonprofit organization; or

(D) solely for the purposes of section 4622(a) of this title, for assisting in the purchase, sale, resale, manufacture, processing, or marketing of products, commodities, personal property, or services by the erection and maintenance of an outdoor advertising display or displays, whether or not such display or displays are located on the premises on which any of the above activities are conducted.

(8) The term "farm operation" means any activity conducted solely or primarily for the production of one or more agricultural products or commodities, including timber, for sale or home use, and customarily producing such products or commodities in sufficient quantity to be capable of contributing materially to the operator's support.

(9) The term "mortgage" means such classes of liens as are commonly given to secure advances on, or the unpaid purchase price of, real property, under the laws of the State in which the real property is located, together with the credit instruments, if any, secured thereby.

Pub.L. 91-646, Title I, §101, Jan. 2, 1971, 84 Stat. 1894.

§4621. Declaration of policy

The purpose of this subchapter is to establish a uniform policy for the fair and equitable treatment of persons displaced as a result of Federal and

federally assisted programs in order that such persons shall not suffer disproportionate injuries as a result of programs designed for the benefit of the public as a whole.

Pub.L. 91-646, Title II, §201, Jan. 2, 1971, 84 Stat. 1895.

§4624. Replacement housing for tenants and certain others

In addition to amounts otherwise authorized by this subchapter, the head of the Federal agency shall make a payment to or for any displaced person displaced from any dwelling not eligible to receive a payment under section 4623 of this title which dwelling was actually and lawfully occupied by such displaced person for not less than ninety days prior to the initiation of negotiations for acquisition of such dwelling. Such payment shall be either--

(1) the amount necessary to enable such displaced person to lease or rent for a period not to exceed four years, a decent, safe, and sanitary dwelling of standards adequate to accommodate such person in areas not generally less desirable in regard to public utilities and public and commercial facilities, and reasonably accessible to his place of employment, but not to exceed $4,000, or

(2) the amount necessary to enable such person to make a downpayment (including incidental

expenses described in section 4623(a)(1)(C) of this title) on the purchase of a decent, safe, and sanitary dwelling of standards adequate to accommodate such person in areas not generally less desirable in regard to public utilities and public and commercial facilities, but not to exceed $4,000, except that if such amount exceeds $2,000, such person must equally match any such amount in excess of $2,000, in making the downpayment.

Pub.L. 91-646, Title II, §204, Jan. 2, 1971, 84 Stat. 1897.

§4630. Requirements for relocation payments and assistance of Federally assisted program; assurances of availability of housing

Notwithstanding any other law, the head of a Federal agency shall not approve any grant to, or contract or agreement with, a State agency, under which Federal financial assistance will be available to pay all of part of the cost of any program or project which will result in the displacement of any person on or after January 2, 1971, unless he receives satisfactory assurances from such State agency that--

(1) fair and reasonable relocation payments and assistance shall be provided to or for displaced persons, as are required to be provided by a Federal agency under sections 4622, 4623, and 4624 of this title;

(2) relocation assistance programs offering the services described in section 4625 of this title shall be provided to such displaced persons;

(3) within a reasonable period of time prior to displacement, decent, safe, and sanitary replacement dwellings will be available to displaced persons in accordance with section 4625(c)(3) of this title.

Pub.L. 91-646, Title II, §210, Jan. 2, 1971, 84 Stat. 1899.

§4633. Regulations and procedures

Consultation of heads of Federal agencies

(a) In order to promote uniform and effective administration of relocation assistance and land acquisition of State or local housing agencies, or other agencies having programs or projects by Federal agencies or programs or projects by State agencies receiving Federal financial assistance, the heads of Federal agencies shall consult together on the establishment of regulations and procedures for the implementation of such programs.

Establishment of regulations and procedures to assure fair, reasonable, and uniform administration, prompt or advance payment, and review of application

(b) The head of each Federal agency is authorized to establish such regulations

and procedures as he may determine to be necessary to assure--

(1) that the payments and assistance authorized by this chapter shall be administered in a manner which is fair and reasonable, and as uniform as practicable;

(2) that a displaced person who makes proper application for a payment authorized for such person by this subchapter shall be paid promptly after a move or, in hardship cases, be paid in advance; and

(3) that any person aggrieved by a determination as to eligibility for a payment authorized by this chapter, or the amount of a payment, may have his application reviewed by the head of the Federal agency having authority over the applicable program or project, or in the case of a program or project receiving Federal financial assistance, by the head of the State agency.

Other regulations and procedures

(c) The head of each Federal agency may prescribe such other regulations and procedures, consistent with the provisions of this chapter, as he deems necessary or appropriate to carry out this chapter.

Pub.L. 91-646, Title II, §213, Jan. 2, 1971, 84 Stat. 1900.

Docket No. 81-2332

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

NORFOLK REDEVELOPMENT AND HOUSING AUTHORITY, A POLITICAL SUBDIVISION OF THE COMMONWEALTH OF VIRGINIA,

Petitioner,

v.

THE CHESAPEAKE AND POTOMAC TELEPHONE COMPANY OF VIRGINIA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

JOINT APPENDIX

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Counsel for Respondent

* Counsel of Record

PETITION FOR CERTIORARI FILED JUNE 22, 1982
CERTIORARI GRANTED JANUARY 17, 1983

TABLE OF CONTENTS

	Appendix Page
1. Relevant Docket Entries	i-iii
2. Complaint Filed October 10, 1979	1
3. Answer by Norfolk Redevelopment and Housing Authority filed October 30, 1970	15
4. Federal Defendant's Answer filed on December 14, 1979	24
5. Order for Bifurcation of trial filed October 29, 1980	34
6. Excerpt from Final Pre-trial Conference Order filed November 18, 1980, containing Stipulation of Fact	36
7. Memorandum Opinion filed June 4, 1981	48
8. Judgment Order filed June 4, 1981	62
9. Opinion of the United States Court of Appeals	63

	Appendix Page
10. Excerpts from Transcript of Proceedings of November 25, 1980	
Testimony of Richard Tucker	79
Testimony of Robert Kunkler	159
Testimony of David Rice	181
Testimony of Robert Kunkler	146
Testimony of George W. Austin, Jr.	220
Statement by the Court	226
11. Exhibit No. 1 - C & P Ordinance	228
12. Exhibit No. 17(A), 17(B) List of Property	244
13. Exhibit No. 20(AA)(13) - Letter of Hill to Freeman dated March 19, 1973	258
14. Exhibit No. 20(AA)(17) - Letter of Norris to Hill dated March 29, 1973	261

	Appendix Page
15. Exhibit No. 21 - Decision letter from HUD Area Office dated June 18, 1979	263
16. Exhibit No. 32 - Letter from C & P to Commissioner of Revenue dated April 21, 1972	292
17. Exhibit No. 33 - Deed of Easement from NRHA to VEPCO dated April 23, 1980	295
18. Public Service Co. of Okla. v. Patricia Harris, et al	303
19. Lone Star Gas Co. v. Moon Landrieu, et al	319

DOCKET ENTRIES

UNITED STATES DISTRICT COURT

DATE	NR.	VOL. I PROCEEDINGS
1979		
Oct. 10	1	Complaint.
Oct. 30	3	Answer on behalf of Norfolk Redevelopment and Housing Authority (NRHA).
Dec. 14	4	Answer on behalf of Federal defendant.
1980		
Sept. 24	9	Motion for bifurcation of the issues of liability and damages or in the alternative for an extension of time for discovery on behalf of the defendants.
Oct. 29	12	Order directing that this case is bifurcated and that the trial scheduled for November 25, 1980 is solely on the issue of liability; further should the court decide the issue of liability adversely to the defendants then the matter will be promptly scheduled for a hearing on

		the issue of damages entered October 20, 1980. JAMack, Judge. Copy in lieu of notice 10-29-80.
Nov. 18	13	Order on final pretrial conference entered in presence of counsel November 14, 1980. RBK,Judge.
1981		
Jan. 5		Transcript of proceedings of November 25, 1980.
June 5	16	Memorandum opinion entered and filed June 4, 1981. JAMack,j. Copies mailed by judge's office.
June 5	17	Order denying plaintiff's prayer for relief entered June 4, 1981. JAMack,j. O.B. Copies to counsel by Judge's office.
July 6	18	Notice of appeal on behalf of the plaintiff.
July 14		Record on appeal mailed to U.S. Court of Appeals ($4.50)

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

1982

Mar. 25	Opinion
Apr. 22	Order granting Appellees Motion for Stay of Mandate
May 21	Motion of Appellees for Extension of Stay of Mandate
May 21	Order Staying Mandate Additional 30 days
June 18	Motion of Appellees for Extension of Stay of Mandate
June 18	Order Staying Mandate Additional 30 days

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
NORFOLK DIVISION

THE CHESAPEAKE AND POTOMAC
TELEPHONE COMPANY OF
VIRGINIA,

Plaintiff,

v.

CIVIL ACTION
NO. 79-906-N

MOON LANDRIEU,
in his official capacity as
Secretary of Housing and
Urban Development

and

NORFOLK REDEVELOPMENT AND
HOUSING AUTHORITY,

Defendants.

COMPLAINT

1. Plaintiff is a public service corporation organized under the laws of Virginia, engaged in the business of selling telephone service and other telecommunication services in various

portions of the State of Virginia, including the City of Norfolk where approximately seven percent of its total business is conducted. Defendant Moon Landrieu is head of the Department of Housing and Urban Development, a department of the executive branch of the United States government. Defendant Norfolk Redevelopment and Housing Authority is a political subdivision of the State of Virginia operating in the City of Norfolk, hereinafter referred to as "the Authority."

2. This action arises under 42 U.S.C. §§ 4601 et seq. and seeks remedies authorized by 5 U.S.C. §§ 704 and 706 and by 28 U.S.C. §§ 2201 and 1361. The Court has jurisdiction under 28 U.S.C.

§ 1331(a), under 28 U.S.C. § 1361, and under 42 U.S.C. § 1456(1).

3. At various times prior to the removal and relocation of plaintiff's telephone facilities hereinafter mentioned HUD contracted with the Authority to make capital grants pursuant to 42 U.S.C. § 1453 for certain urban renewal projects designated VA R-8, VA R-25 and VA A-1, respectively, each project to be carried out in accordance with an urban renewal plan approved by the City Council of the City of Norfolk for a designated project area within the City.

4. The urban renewal plan for each project required that all or substantially all of the land in the project area be acquired and cleared by the Authority and that the tract of vacant land so created

be subdivided for sale or lease to private purchasers or lessees in accordance with a new or revised plan of subdivision, including a new or revised street plan for the area, for redevelopment in a prescribed manner beneficial to the local community as a whole. Pursuant to said plans the Authority has acquired, and has sold or leased for redevelopment or still holds for sale or lease to redevelopers, all of the land to be redeveloped in said project areas.

5. The land to be redeveloped in each project area included land which, at the time when the urban renewal plan was adopted, then was and for many years had been dedicated to public street use and occupied by existing streets but which would not be so used under the new street

plan for the area. To make possible the acquisition and transfer of complete ownership of such land, unencumbered by the public street easement, each plan provided that the Authority should first purchase or condemn all private property in the project area, including the abutting landowners' title, subject to the public easement, to the land in the streets and their special rights to continued use of the streets, after which the Authority should request the City Council to extinguish the public easement by vacating and discontinuing the streets. In accordance with said plans and by this means the Authority has acquired and sold or leased for redevelopment, or still holds for sale or lease to redevelopers, various parcels of real estate formerly

occupied by streets and parts of streets within each of said projects.

6. In the exercise of franchise rights granted by the City of Norfolk and with the prior consent of the corporate authorities of the City plaintiff had installed many of its telephone lines and appurtenant equipment, all consisting of personal property owned, maintained and operated by plaintiff, in public streets of the city, including streets in said project areas which are not part of the new or revised street plan for the project, with the result that the Authority has acquired and sold or leased for redevelopment, or still holds for sale or lease to redevelopers, numerous parcels of real estate from which it has required that plaintiff remove and relocate its

telephone lines and equipment.

7. At various times since the effective date (January 2, 1971) of the Uniform Relocation Assistance and Real Property Acquisitions Policies Act, 42 U.S.C. § 4601 et seq., plaintiff has moved its personal property from real property as a result of the acquisition of that real property for the projects aforesaid, all of which were undertaken with Federal financial assistance, and as a direct result of projects and programs which received Federal financial assistance under Title 1 of the Housing Act of 1949, as amended. In doing so plaintiff has incurred actual reasonable expenses in the aggregate amount of Six Hundred Eighty-Six Thousand Four Hundred Twenty-Two Dollars and Fifty-Three Cents ($686,422.53).

8. Claims for relocation payments in the aggregate amount aforesaid were properly submitted to the Authority by the plaintiff, in the manner and within the time prescribed by applicable regulations (24 C.F.R. Part 42, §§ 42.1 et seq.) adopted by HUD pursuant to 42 U.S.C. §§ 4633 and 3535(d), and all of said claims have been rejected. On August 11, 1976, the Authority notified plaintiff that all of its claims theretofore submitted (on May 4, 1975, May 5, 1975 and November 19, 1975) "are hereby rejected." On September 9, 1976, plaintiff submitted to the Authority a request for review and reconsideration of plaintiff's claims and for a written explanation of the Authority's initial decision thereon, all as provided for by applicable regulations adopted by

HUD (24 C.F.R. §§ 42.235-42.240.) Plaintiff's claims remained under review and reconsideration by the Authority from September 9, 1976 until August 28, 1978, during which time the original claims were amended and supplemented, on April 8, 1977, to include additional expenses incurred in removing plaintiff's facilities from land acquired by the Authority in the same projects involved in the original claims, and an additional claim submitted August 16, 1977, for expenses incurred in moving plaintiff's facilities from the third project hereinabove mentioned was added and thenceforth included, by agreement between plaintiff and the Authority, among the claims under review and reconsideration by the Authority. Throughout the time when plaintiff's

claims were under review and reconsideration by the Authority plaintiff had assembled and furnished to the Authority all additional documentation and information pertaining to its claims which the Authority at various times and from time to time requested.

9. On August 28, 1978 the Authority issued its final determination on review and reconsideration of all of plaintiff's claims, again denying said claims.

10. The Authority's final determination on review of plaintiff's claims was communicated to plaintiff September 11, 1978. On September 28, 1978 the plaintiff requested review of its claims by HUD, as provided by further regulations (24 C.F.R. §42.245) adopted by HUD. Plaintiff's claims remained under review

by HUD until June 18, 1979, when HUD issued a final determination and decision on review and reconsideration of said claims, setting forth its findings of fact and conclusions of law as required by its regulations (24 C.F.R. § 42.250(a). By said determination and decision HUD specifically found and concluded that plaintiff had moved its telephone lines and equipment from real property acquired by the Authority; that the property so moved was personal property; that plaintiff's property had been so moved as a result of the acquisition of said real property by the Authority for programs or projects undertaken by a Federal agency, or with Federal financial assistance, within the meaning of 42 U.S.C. § 4601(6), and as a direct result of projects or programs which

received Federal financial assistance under Title I of the Housing Act of 1949 within the meaning of 42 U.S.C. § 4637; that plaintiff had filed its claims for relocation payments in a timely manner and had diligently pursued its administrative remedies before the Authority and before HUD. HUD nevertheless concluded that the provisions of 42 U.S.C. §§ 4601 et seq. did not entitle plaintiff to relocation payments for the expense of moving its telephone lines and equipment from land formerly dedicated to public use as the result of the acquisition of that land for the projects aforesaid.

WHEREFORE plaintiff prays for a declaratory judgment adjudicating that plaintiff is eligible for relocation payments as provided for by 42 U.S.C. §§

4601 et seq. for the actual reasonable expenses of moving its telephone lines and equipment from real estate formerly dedicated to public street use as a result of the Authority's acquisition of that real estate for said urban renewal projects; for an order in the nature of mandamus ordering HUD to direct the Authority, in accordance with its applicable regulations (24 C.F.R. § 42.250(c)(3)) to pay plaintiff's claims, with interest from the date of each claim until paid; and for a judgment against the defendants and each of them in the amount of $686,422.53 plus interest computed on each portion thereof embraced in a claim submitted by plaintiff

to the Authority from the date of said claim until paid.

THE CHESAPEAKE AND POTOMAC TELEPHONE COMPANY OF VIRGINIA

By /s/Joseph L. Kelly

Williams, Worrell, Kelly & Greer
P. O. Box 3416
Norfolk, Virginia 23514
Counsel

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
NORFOLK DIVISION

THE CHESAPEAKE AND POTOMAC TELEPHONE COMPANY OF VIRGINIA,

Plaintiff,

v. CIVIL ACTION NO. 79-906-N

MOON LANDRIEU, etc., et al.,

Defendants.

ANSWER

The defendant, Norfolk Redevelopment and Housing Authority (NRHA), by counsel, responds as follows to the complaint filed herein by The Chesapeake and Potomac Telephone Company of Virginia (C&P):

1. The defendant, NRHA, neither admits nor denies the plaintiff's allegations as to the amount of business it

conducts in Norfolk, but the remaining allegations of paragraph 1 of the complaint are admitted.

2. The allegations of the second paragraph of the complaint are conclusions of law and require no response by this defendant.

3. The allegations of the third paragraph of the complaint are admitted, with the exception that the plans for the projects designated in paragraph 3 of the complaint are called Redevelopment Plans, which are authorized under Title 36 of the Code of Virginia.

4. It is admitted that the Redevelopment Plan for each of the projects designated in paragraph 3 of the complaint required that all or substantially all of the land in each project

area would be acquired and cleared by NRHA and that the tract of land so created would be made available for redevelopment by private or public enterprise. It is denied that the plan required the land to be subdivided for sale or lease to private purchasers or lessees in accordance with the new or revised plan of subdivision, including a new or revised street plan for the area. It is further admitted that property within the project areas was acquired in accordance with the terms of the Redevelopment Plans, and that certain property within the project areas was sold or leased for redevelopment by public or private enterprise and that certain property within each of the projects is still available for disposition.

5. It is admitted that land included

within each project area was at the time the Redevelopment Plan was adopted and for many years prior thereto, dedicated and used as public streets. It is admitted that the new right-of-way plan proposed by the Redevelopment Plan contemplated that some of such land would not be used in the same purposes as prior to the adoption of the Redevelopment Plan. It is admitted that each Redevelopment Plan provided that NRHA should first acquire all private property which was expressly excluded from acquisition according to the terms of the Plan, which acquisition would include, except as so excepted, the title of land owners who abutted public right-of-ways situated within the project area. It is admitted that the Plan contemplated that NRHA would request the Council of the City

of Norfolk to extinguish the public easement in certain streets by vacating and discontinuing the same. It is admitted that NRHA has acquired property situated within the redevelopment project areas and has sold certain property to public or private entities for redevelopment and that some of these parcels of real estate formerly constituted the beds of streets or portions of streets within each of the said projects. Except as hereinabove expressly admitted, the allegations of the fifth paragraph of the complaint are denied.

6. This defendant is not advised as to the authorization under which the plaintiff has installed its telephone lines and appurtenant equipment within the public streets of the City of Norfolk,

including streets situated within or traversing said project areas, and accordingly, neither admits nor denies planitiff's allegations respecting the same. It is admitted, however, that plaintiff has installed certain lines and appurtenant equipment within the right-of-way of certain public streets in the City of Norfolk. This defendant denies that the telephone lines and appurtenant equipment so installed were personal property. This defendant denies that it has required the plaintiff to remove or relocate its telephone lines and equipment from any streets situated within the City of Norfolk. The removal was caused by the closure of the streets, which extinguished the plaintiff's rights to have its lines or equipment situated in the former

rights-of-way.

7. The allegations contained in the first sentence of paragraph 7 are denied. The plaintiff is not advised of the reasonableness of any expenses incurred by the plaintiff and calls for strict proof thereof.

8. It is admitted that the plaintiff submitted claims for relocation payment in the amount of $686,422.53 and this defendant raises no objection to the manner or the time within which such claims were presented. It is admitted that this defendant notified the plaintiff that such claims were rejected.

9. The allegation of paragraph 9 is admitted.

10. The allegations of paragraph 10 are admitted.

FIRST AFFIRMATIVE DEFENSE

11. This defendant denies that the plaintiff, a utility company, is a displaced person or business and, therefore, is entitled to benefits under the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1971, 42 U.S.C. § 4601, et seq.

SECOND AFFIRMATIVE DEFENSE

12. This defendant denies that the plaintiff has a sufficiently durable right to the underground location of its lines and equipment to entitle it to benefits under the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1971, 42 U.S.C. § 4601, et seq.

THIRD AFFIRMATIVE DEFENSE

13. This defendant denies that the telephone lines and equipment owned by the

plaintiff constituted personal property.

FOURTH AFFIRMATIVE DEFENSE

14. This defendant denies that such telephone lines were removed as a result of the acquisition of real property by this defendant.

NORFOLK REDEVELOPMENT AND HOUSING AUTHORITY

By /s/Francis Crenshaw
Of Counsel

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. . .

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
NORFOLK DIVISION

THE CHESAPEAKE AND POTOMAC
TELEPHONE COMPANY,

Plaintiff,

v. CIVIL ACTION
NO. 79-906-N

MOON LANDRIEU, Secretary
of HUD, NORFOLK REDEVELOPMENT
AND HOUSING AUTHORITY,

Defendants.

FEDERAL DEFENDANT'S
ANSWER

Comes Now, Moon Landrieu, Secretary of the United States Department of Housing and Urban Development, by his attorneys, Justin W. Williams, United States Attorney in and for the Eastern District of Virginia, and Michael A. Rhine, Assistant United States Attorney, and Answers each

sentence of the complaint as follows:

1. Defendant is without sufficient knowledge or information to form an opinion or belief as to the amount of business that the plaintiff conducts in the City of Norfolk and this allegation is denied. The remaining allegations in paragraph 1 are admitted.

2. The allegations in the first sentence of paragraph 2 constitute a characterization of plaintiff's complaint to which no response is necessary. The remaining allegations are conclusions of law and no responsive pleading is required.

3. The allegations in the third

paragraph of the complaint are admitted, with the exception that the plans for the projects designated in paragraph 3 of the complaint are called Redevelopment Plans, which are authorized under Title 36 of the Code of Virginia.

4. It is admitted that the Redevelopment Plan for each of the projects designated in paragraph 3 of the complaint required that all or substantially all of the land in each project area would be acquired and cleared by NRHA and that the tract of land so created would be made available for redevelopment by private or public enterprise.

It is denied that the plan required the land to be subdivided for sale or lease to private purchasers or lessees in accordance with the new or revised plan of subdivision, including a new or revised street plan for the area. It is further admitted that property within the project areas was acquired in accordance with the terms of the Redevelopment Plans, and that certain property within the project areas was sold or leased for redevelopment by public or private enterprise and that certain property within each of the projects is still available for disposition.

5. Admitted.

6. Defendant is without sufficient information to form an opinion or belief as to the authorization under which the plaintiff has installed its telephone lines and appurtenant equipment within the public streets of the City of Norfolk, including streets situated within or traversing said project areas, and these allegations are denied. It is admitted that plaintiff has installed certain lines and appurtenant equipment within the right-of-way of certain streets in the City of Norfolk. The allegation that the lines and equipment are personal property

is a conclusion of law and no responsive pleading is required. Defendant denies that the Norfolk Redevelopment and Housing Authority required the plaintiff to remove or relocate its telephone lines and equipment from any streets situated within the City of Norfolk, but rather the removal and relocation of plaintiff's lines and equipment was caused by the closure of the streets by the City of Norfolk. It was this action on the part of the City of Norfolk that extinguished the plaintiff's rights to have its lines or equipment situated in the public right-of-way.

7. It is admitted that certain urban renewal and neighborhood redevelopment projects in the City of Norfolk received Federal financial assistance under Title I of the Housing Act of 1949, as amended, 42 U.S.C. § 1453, et seq. The remaining allegations in the first sentence of paragraph seven are denied. Defendant is without sufficient knowledge or information to form an opinion or belief as to the reasonableness and amount of expenses incurred by the plaintiff and they are denied.

8. It is admitted that the plaintiff submitted claims for relocation payments in the amount of

$686,422.52 and defendant raises no objection to the manner or the time within which these claims were presented. It is admitted that the Norfolk Redevelopment and Housing Authority notified the plaintiff that such claims were rejected. Defendant is without sufficient knowledge or information to form an opinion or belief as to the remaining allegations in paragraph 8 and they are denied.

9. Admitted.

10. The allegations in the first and second sentences of paragraph 10 are admitted. Attached to the Answer as defendant's Exhibit A is a copy of the administrative

decision denying plaintiff's claim. The contents of this administrative decision speak for itself. Accordingly, the remaining allegations in paragraph 10 are denied.

The remainder of the complaint constitutes plaintiff's prayer for relief to which no response is necessary.

FIRST DEFENSE

Plaintiff has failed to state a claim upon which relief can be granted.

Respectfully submitted,

/s/Sammy L. Sims

/s/Michael A. Rhine

Of Counsel:

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Regional Counsel

Paul A. Feiner
Associate Regional Counsel

Sammy L. Sims
Attorney-Advisor
Department of Housing and
Urban Development

. . .

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
NORFOLK DIVISION

THE CHESAPEAKE AND POTOMAC
TELEPHONE COMPANY OF
VIRGINIA,

Plaintiff,

v. CIVIL ACTION NO. 79-906-N

MOON LANDRIEU, etc., et al.,

Defendants.

O R D E R

On motion of the defendants herein it is hereby ORDERED that this case be bifurcated and that the trial presently scheduled for November 25, 1980 be solely on the issue of liability; and it is further ORDERED that should this Court decide the issue of liability adversely to the defendants then the matter will be promptly

scheduled for a hearing before this Court on the issues of damages.

/s/J. A. MacKenzie
UNITED STATES DISTRICT JUDGE

DATE: Oct. 20, 1980

/s/Michael A. Rhine
Of Counsel for HUD

/s/Jack E. Greer
Of Counsel for C&P Telephone

/s/Francis N. Crenshaw
Of Counsel for Norfolk Redevelopment and Housing Authority

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
NORFOLK DIVISION

THE CHESAPEAKE AND POTOMAC
TELEPHONE COMPANY OF
VIRGINIA,

Plaintiff,

v. CIVIL ACTION
NO. 79-906-N

MOON LANDRIEU,
in his official capacity as
Secretary of Housing and
Urban Development

and

NORFOLK REDEVELOPMENT AND
HOUSING AUTHORITY,

Defendants.

ORDER ON FINAL PRE-TRIAL CONFERENCE

In conformity with the Local Rules for the United States District Court for the Eastern District of Virginia relating to pre-trial procedure, it is ORDERED that:

I. The parties hereto agree upon a stipulation in respect to certain undisputed facts as follows:

1. The Chesapeake and Potomac Telephone Company of Virginia (hereinafter C & P) is a privately owned utility company providing telephone service to that portion of the general public who subscribe to its services. The subscribers who reside in Norfolk represent but a fraction of the subscribers of the C & P System, constituting approximately 7% of the total.

2. The term "Relocated Facilities", as used in this stipulation, includes all cables, lines, guys, supports, poles or other equipment or facilities of any kind which

the plaintiff, C & P, has removed from a prior location and for which relocation benefits are being claimed in this litigation.

3. All of the Relocated Facilities had been installed, maintained and operated by C & P within the public right-of-way of certain streets situated in the City of Norfolk as shown on plats marked P/T Exhibit Numbers 2-5 & 11-16, pursuant to rights derived from a franchise ordinance of the City of Norfolk dated April 5, 1898 and marked P/T Exhibit No. 1.

4. Norfolk Redevelopment and Housing Authority (NRHA) adopted and the City of Norfolk approved redevelopment or conservation plans for

Ghent Neighborhood Conservation Project Va. R-43; East Ghent South Redevelopment Project, Va. A-1-1; East Ghent North Redevelopment Project, Va. A-1-2; Rosemont Redevelopment Project, Va. R-25; Downtown North Redevelopment Project, Va. R-8; and Berkley II Redevelopment and Conservation Project, Va-A-1-5, which projects included portions of the streets in which C & P had placed its Relocated Facilities. A copy of the property map for each redevelopment or conservation project is marked P/T Exhibit Nos. 6-10.

5. NRHA acquired land abutting (on both sides) certain of the aforementioned streets all as shown on P/T Exhibit Nos. 6-10.

6. The City of Norfolk thereafter, by the ordinances listed below, closed portions of certain public streets in which the Relocated Facilities had been placed, these portions of the streets being shown on P/T Exhibit Nos. 2-5 and the ordinances being:

(a) Ordinance No. 23,887, adopted by the Norfolk City Council on April 25, 1967, closing certain streets in the Rosemont Redevelopment Project, Va. R-25.

(b) Ordinance No. 24,462, adopted by the Norfolk City Council on July 16, 1968, closing certain streets in the Rosemont Redevelopment Project, Va. R-25.

(c) Ordinance Nos. 26,706 and

26,707, adopted by Norfolk City Council on January 2, 1973, closing certain streets within the East Ghent North Redevelopment Project, Va. A-1-2.

(d) Ordinance Nos. 28,157 and 28,158, adopted by the Norfolk City Council on September 24, 1975, closing certain streets within the East Ghent South Redevelopment Project, Va. A-1-1.

(e) Ordinance No. , adopted by Norfolk City Council on closing certain streets in Berkley II Redevelopment and Conservation Project, Va. A-1-5.

7. Subsequent to the street closures, NRHA has disposed of, dedicated for public use, offered to

dispose of, or has retained for future dedication or disposition all of the land which formerly constituted the street bed of those streets closed by Norfolk City Council and mentioned above.

8. All Relocated Facilities were removed subsequent to January 2, 1971, the effective date of the Uniform Real Property Acquisition and Relocation Policies Act.

9. The net project cost of each urban renewal project involved in this litigation is borne two-thirds (2/3) by the Federal Government and one-third (1/3) by local grants-in-aid. Included in the net project cost of each project is the cost of any necessary relocation of any

municipally owned public utility lines in public streets. When such streets were vacated and closed in accordance with the urban renewal plan the non-betterment cost of such relocation of municipally owned utility lines is eligible under HUD regulations for inclusion in required local grants-in-aid. Under the HUD regulations such payments are not eligible as a relocation cost, but as an eligible cost of site improvement.

10. C & P has, from time to time, and at the request of the City of Norfolk, relocated facilities located on street beds pursuant to its franchise, where such relocation was necessary to accommodate street improvement or alteration. Such action

has been taken at the expense of C & P without any compensation from the City of Norfolk.

11. When in the course of its normal business practices C & P has relocated its facilities from the right-of-way of public streets upon the direction of the City of Norfolk, the cost of such relocation like any other expense has been borne by C & P as part of its operating expenses within the rate structure approved by the State Corporation Commission.

12. The property within the project areas was acquired by NRHA in accordance with the terms of the Redevelopment Plans, and certain property within the project areas was sold or leased for redevelopment by

public or private enterprise and certain property within each of the projects is still available for such disposition.

13. After passage of the several street closing ordinances C & P was not permitted to retain the Relocated Facilities in the former street beds, except on a temporary basis.

14. All work of removal and all work of related reinstallation of the Relocated Facilities was done in accord with plans approved by NRHA and the approximate location of such work is shown on P/T Exhibit Nos. 2-5.

15. The C & P work was begun and completed within the following approximate dates:

Llewellyn Avenue (C & P Est. No.

1304) July, 1972 through January, 1974.

Ghent Area - Westover Avenue, etc. (C & P Est. No. 1677) February, 1973 through July, 1976.

Olney Road (C & P Est. No. 2109) April, 1972 through June, 1974.

Rosemont (C & P Est. No. 2171) March, 1972 through September, 1975.

Berkley Avenue (C & P Est. No. 3327) September, 1977 through January, 1979.

Charlotte Street (C & P Est. No. 1268) February, 1972 through February, 1974.

16. C & P submitted its claims in a timely fashion and administrative remedies were pursued in a proper and timely fashion and have been exhausted

prior to the institution of this suit.

. . .

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

Norfolk Division

THE CHESAPEAKE AND POTOMAC TELEPHONE COMPANY OF VIRGINIA, Plaintiff	]	
v.	]	CIVIL ACTION NO. 79-906-N
MOON LANDRIEU, ETC., and NORFOLK REDEVELOPMENT AND HOUSING AUTHORITY, Defendants	]	

MEMORANDUM OPINION

The Chesapeake and Potomac Telephone Company of Virginia ("Telephone Company") here sues the Secretary of Housing and Urban Development ("HUD") and Norfolk Redevelopment and Housing Authority ("NRHA"), seeking reimbursement for the

relocation of its telephone lines, cables, conduits, poles, and related equipment in four federally-aided redevelopment projects in the City of Norfolk, Virginia. The central issue is the applicability of the provisions of the Federal Relocation Assistance Act, also known as the Uniform Relocation Act of 1970 ("URA"), 42 U.S.C. §§ 4601 et seq. The Virginia Legislature has adopted an enabling act to bring Virginia localities under the umbrella of the federal Uniform Relocation Act. See, §§ 25-235 et seq., Code of Virginia.

It is stipulated that the defendant NRHA acquired title to certain blighted areas in Norfolk for the purpose of redevelopment projects; that the land so acquired included streets in which the Telephone Company's lines and conduits

were located; and that in the redevelopment of the areas the Telephone Company was required to relocate its utility equipment in accordance with the plan established for the redevelopment of each pertinent area.

The statutes relied upon in the Telephone Company complaint are part of the Federal Relocation Assistance Act, 42 U.S.C. §§ 4601, 4622 and 4637, and read as follows:

> "4622. (a) Whenever the acquisition of real property for a program or a project. . . will result in the displacement of any person . . . the head of such agency shall make a payment to any displaced person . . . for - (1) actual reasonable expenses in moving himself, his family, business, farm operation or other personal property; (2) actual direct losses of tangible personal property as a result of moving or discontinuing a busi-

ness or farm operation, but not to exceed an amount equal to the reasonable expenses that would have been required to relocate such property . . . .

"§ 4601. Definitions. As used in this chapter -

(5) The term 'person' means any individual, partnership, corporation or association.

(6) The term 'displaced person' means any person who . . . moved from real property, or moves his personal property from real property as a result of the acquisition of such real estate, in whole or in part, or as a result of the written order of the acquiring agency to vacate such real property, for a program or a project . . . .

(7) The term 'business' means any lawful activity, excepting a farm operation conducted primarily -

(a) for the sale of services to the public . . . .

"§ 4637. A person who moves or discontinues his business, or moves other personal property . . . as a direct result of any project or program . . . shall . . . be deemed to have been displaced as a result of

the acquisition of real property."

HUD and NRHA, defendants, deny that the Uniform Relocation Assistance Act includes public utilities such as the Telephone Company or that the statutes are to be given the broad reading necessary to encompass the plaintiff's claim.

Concluding that utilities are not included under the Uniform Relocation Act of 1970, we DENY the Telephone Company's request for reimbursement thereunder.

I

In the litigation of situations reasonably akin factually to those presented here, courts have been unanimous in denying such utility relocation claims. Consumer Power Company v. Costle, 615 F.2d

1147 (6th Cir. 1980), held that relocation benefit for a gas main which had to be relocated in a new right-of-way in a redevelopment project was denied; Pacific Telephone and Telegraph v. Redevelopment Agency of Glendale, 151 Cal. Rptr. 68, 87 Cal. App. 3d 296 (1978), under a State Act of the same language as the federal Relocation Act, the court found that a public utility accepts franchise rights in public streets subject to an implied obligation to relocate those facilities at its own expense when necessary to make way for a redevelopment project relieving urban blight. Artesian Water Co. v. State Department of Highways and Transportation, 330 A.2d 432 (Del. 1974), held that the Uniform Relocation Act was not intended to extend coverage to include utilities

within its definition of displaced persons or businesses. Mountain States Telephone and Telegraph Company v. Boise Redevelopment Agency, 607 P.2d 1084, 101 Idaho 30 (1980), stated that the overwhelming view in this country is that public utilities are not entitled to relocation costs incurred in making way for governmentally sponsored projects and the Uniform Relocation Act does not change this common law rule. To like effect, Public Service Company of Oklahoma v. Harris, No. 79-C-37-3T (N.D. Okla., August 22, 1980); Lone Star Gas Company, etc. v. Moon Landrieu, No. 80-100-C (E.D. Okla, March 30, 1981).

These cases are ample authority, upon almost identical factual situations and with the same state and federal statutory

overview that a private utility company is not a beneficiary for relocation expenses under the Uniform Relocation Act of 1970.

II

The common law has long been fully developed that utilities, shielded from competition by a franchise, accept their right to install utility lines in public rights-of-way thoroughly cognizant of their obligation to relocate such lines upon demand at no cost to the City, County or State. No authority for this obligation need be cited.

In Virginia during the period of the conception of the Uniform Relocation Act, the mid-1960's, relocation costs of utility lines, particularly in the expansion of highways, raised a real furor of

intense and vocal interest both to the utilities attempting to collect reimbursement and to the Virginia Highway Department in its disclaimer of liability for such costs. Potomac Electric Power Company v. Fugate, 275 F.Supp. 566 (E.D. Va. 1967); PEPCO v. Highway Commissioner, 211 Va. 745, 180 S.E.2d 657 (1971); Potomac Power Electric Power Company v. Fugate, 341 F.Supp. 887 (1972); Potomac Elec. Power Co. v. Fugate, 574 F.2d 1163 (4th Cir. 1978). This contest was and is part of the public record and was prominently and contemporaneously in the foreground while passage of the Relocation Act of 1970 was before Congress.

In the adoption of the Uniform Relocation Act of 1970 if Congress chose to abrogate such a well known common law

principal, it would certainly have included in that legislation a clear affirmative statement of that revocation. Instead, no such reversal of the common law concept appears in the language of the Act nor its legislative notes and history. So also, in light of then ongoing litigation over relocation costs, had it been the intent of Congress to reimburse utilities for relocation costs in redevelopment projects, it appears that such intent most certainly would have been specifically stated in light of the fact that Congress had passed a special statute, a Federal Highway Aid Act in 1958, to give such relief to utilities relocating lines to accommodate the interstate highway system.

Lastly, public utilities retrieve their operating costs and the reasonable

return of their investment from the general public in their franchise area through rates that are structured to accommodate costs and expenses. No other "persons," "corporations," or "displaced persons," except utilities are so protected by a franchise with a non-competitive market area.

The language of the Supreme Court in Alexander v. U.S. Dept. of HUD, 441 U.S. 39 (1979), indicates the thoroughness of the discussion of the Relocation Act before both the House of Representatives and the Senate Committee. Apparently, many witnesses appeared seeking to enlarge the umbrella of reimbursement to many classes of "displaced persons." No mention is made of any appearances before the Committees of Congress by utility repre-

sentatives. In the end, as Alexander proclaims, the extension of relocation assistance was limited to a fairly narrow group and did not include utilities.

> "The structure of the Relocation Act confirms our conclusion that Congress did not expect to provide assistance for all persons somehow displaced by Government programs." Alexander, supra at page 60.

We believe that it is those unprotected, unfranchised corporations and persons whhich [sic] were contemplated by Congress under the Uniform Relocation Act. A utility company, C & P Telephone Company, serving these redeveloped areas under its franchise is not called upon to compete. Its rates are established by petitions to the State Corporation

Commission which takes into consideration the accounting data essential to the life of the utility and fixes a rate to cover its costs and expenses. On the other hand, a Mom and Pop business, a grocery store, a retail furniture outlet, for instance, which is subjected to the sudden trauma of being forced to relocate elsewhere must do so under competitive conditions in which it cannot realistically raise the price of its products to cover extraordinary relocation costs. It must compete in the market place against competitors beyond the redeveloped area who have no such cost to recoup. These are the "persons," "businesses," "displaced persons," to which the Uniform Relocation Assistance Act extends its largesse.

For the reasons herein stated, the plaintiff's prayer for relief is DENIED.

/s/J. A. MacKenzie
United States District Judge

Norfolk, Virginia
June 4, 1981.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Norfolk Division

THE CHESAPEAKE AND POTOMAC
TELEPHONE COMPANY OF
VIRGINIA,

Plaintiff,

v. CIVIL ACTION
NO. 79-906-N

MOON LANDRIEU, ETC., and
NORFOLK REDEVELOPMENT AND
HOUSING AUTHORITY,

Defendants.

ORDER

In accordance with a Memorandum Opinion filed this date, the plaintiff's prayer for relief is DENIED.

/s/J. A. MacKenzie
United States District Judge

Norfolk, Virginia
June 4, 1981.

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 81-1602

The Chesapeake and Potomac
Telephone Company of
Virginia,

Appellant,

versus

Moon Landrieu, in his official
capacity as Secretary of
Housing and Urban Development,

and

Norfolk Redevelopment and
Housing Authority,

Appellees.

Appeal from the United States District
Court for the Eastern District of
Virginia, at Norfolk. John A. MacKenzie,
District Judge.

Argued
December 7, 1981

Decided
March 25, 1982

Before HAYNSWORTH, Senior Circuit Judge, RUSSELL and WIDENER, Circuit Judges.

Joseph L. Kelly, Jack E. Greer (Williams, Worrell, Kelly and Greer on brief) for Appellant, Francis N. Crenshaw (Ann K. Sullivan, Crenshaw, Ware & Johnson; Justin W. Williams, United States Attorney, Michael L. Rhine, Assistant United States Attorney; Sonia C. Jaipual, John R. Abbot, Peter M. Campenella on brief) for Appellees.

HAYNSWORTH, Senior Circuit Judge:

The questions are whether a utility company can qualify as a "displaced person" under the Uniform Relocation Assistance and Real Property Acquisition Policies Act, 84 Stat. 1894, 42 U.S.C. § 4601 et seq., and whether the plaintiff, Chesapeake & Potomac Telephone Company (C&P), qualifies as a "displaced person" under the facts of this case.

The Department of Housing and Urban Development (HUD) provided funds for the Norfolk Redevelopment and Housing Authority (NRHA) to carry out certain redevelopment projects in Norfolk, Virginia. In order to carry out these projects NRHA acquired title to certain blighted areas in Norfolk. Because of these pr[illegible]cts, C&P was forced to move certain of its telephone lines, cables, conduits, poles and related equipment from what had been streets in Norfolk. Under C&P's franchise agreement with the City of Norfolk, C&P was required to move its lines from public rights-of-way whenever requested by the city to do so.

After moving its lines, C&P requested relocation benefits under the Uniform Relocation Act. C&P's claims were denied

at the administrative level. C&P then brought this action in the district court against the Secretary of HUD and NRHA.

After a trial on the liability issue, the district court determined that Congress did not intend for utilities to qualify as displaced persons under the Act. The plaintiff appeals from this order.

I.

The Uniform Relocation Act defines "displaced person" or "any person who . . . moves . . . as a result of the acquisition of . . . real property . . . for a program or project undertaken by a Federal agency, or with Federal financial assistance . . . ." 42 U.S.C. § 4601(6). "Person" is defined as "any individual, partnership, corporation or association."

42 U.S.C. § 4601(5). "Business" is defined as "any lawful activity, excepting a farm operation, conducted primarily --(A) for the purchase, sale, lease and rental of personal and real property, and for the manufacture, processing, or marketing of products, commodities, or any other personal property; (B) for the sale of services to the public . . . ." 42 U.S.C. § 4601(7). Under 42 U.S.C. § 4622(a) "displaced persons" are entitled to recover from the government any reasonable expenses incurred in moving personal property, and a business required to move is a displaced person.

The plaintiff argues that it is a business within the meaning of the Act and thus is entitled to claim reimbursement for expenses as a displaced person. NRHA

and HUD argue, however, that the Act was not intended to apply to utilities. HUD bases its argument on the settled common law principle that utilities are not entitled to reimbursement for expenses incurred in moving lines when cities close streets. Because the Act does not explicitly mention utilities as parties that can receive benefits under the Act, and because the legislative history of the Act makes no mention of utilities, HUD argues that the Act was not intended to change the common law. We disagree.

HUD's reliance on the common law is unconvincing. The Act was intended to create rights that were not recognized at common law. A tenant at will, for example, can recover relocation expenses as a displaced person under the Act even

though the common law recognized no such right. The plaintiff in this case is, in certain respects, similar to a tenant at will because it has a right to use the city's streets for its lines only at the will of the city.

Congress' failure to mention utilities during the debates on the Act and in the legislative history of the Act also provides little reason to exclude utilities from the Act's coverage. In Alexander v. United States Department of Housing and Urban Development, 441 U.S. 39, 51 (1979), the Supreme Court noted that the original "Declaration of Policy" is S.1, 91st Cong. 1st Sess. § 201(1969), the bill finally enacted as the Uniform Relocation Act, stated that the purpose of the legislation was

> "to establish a uniform policy for the fair and equitable treatment of owners, tenants, and others displaced by the acquisition of real property in Federal and federally assisted programs to the end that such person shall not suffer disproportionate injuries as a result of programs designed for the benefit of the public as a whole."

Similar language is contained in the House Report, H.R. 91-1656 (1970). Thus the Act was intended to extend benefits uniformly to persons who are displaced by federal acquisitions of real property for federal programs. Exclusion of utilities from the Act's coverage would run counter to that purpose.

In the absence of any clear legislative intent to exclude utilities, it is this court's duty to apply the literal language of the statute. Doing so, we

find that a utility comes within the Act's definition of "business" and thus is a "displaced person" under the Act.

II.

HUD contends that the removal of its lines by C&P was not the result of federal acquisition of the real estate. It says that the removal was required by the city's closure of the streets.

Under the statute, relocation expenses are payable if the removal was required "as a result of the acquisition of . . . real property, in whole or in part . . ., for a program or project undertaken by a Federal agency, or with Federal financial assistance . . . ." It is true that the city closed the streets, but the removal seems clearly to have been required as a result of the federal acquisition of the

real estate.

With respect to most of the relocation costs incurred by C&P, they occurred in situations in which NRHA acquired the land abutting both sides of streets. As a result of those acquisitions, the project became the owner of the title in fee simple to the land underlying the streets, subject to the city's easement to maintain them as public ways. At the request of NRHA, the city then released its easements so that NRHA became the owner of the land formerly dedicated to use as streets without the burden of that servitude. While in a very technical sense it may have been the city that closed the streets, the city was acting at the direction or request of HUD and NRHA. It was an essential part of the plan of the

project that the land occupied by the streets to be closed be acquired free of the city's easement so that such land could be incorporated in the redevelopment plan to the same extent as lands acquired, by purchase or condemnation, from private owners. It was the federal acquisition of the streets, an integral part of the redevelopment plan, which required removal of C&P's lines.

Some of the removal expense was incurred with respect to lines in streets that were to be widened and other streets which were only partially closed. The record is not sufficient to permit us to decide whether those expenses resulted in whole or in part from the federal acquisition. This should be the subject to further consideration on remand.

III.

Under 42 U.S.C. § 4622(a), it is the expense of removal of personal property which is reimbursable, and HUD contends that the utility lines were realty. Its regulations required that what is personal property be determined according to the law of the state in which the property is located,[1] and it relies upon Transcontinental Gas Pipe Line v. Prince William County, 210 Va. 550, 555, 172 S.E.2d 757, 761-62 (1970).

In Transcontinental, gas pipe lines had been installed in land which Transcontinental had a perpetual easement for the placement, maintenance and operation of the gas line. The easement was unquestionably real property, belonging to the owner of the lines. Under those

1. 24 C.F.R. §42.40 (m)(2).

circumstances, the Virginia Supreme Court held that the gas lines themselves were real estate belonging to Transcontinental. In so doing, it held that the question whether a chattel annexed to real estate has been converted into a fixture principally depends upon the intention of the party making the annexation.

C&P, in placing its lines, could hardly have intended them to become so annexed to real estate belonging to others that the lines themselves became the real property of those other owners. Clearly it intended to maintain ownership and control of these lines which were not annexed to any real estate owned by C&P of which they might have become a part. Indeed, everyone recognized C&P's right of removal of property which could only have

been its personalty.

In similar situations in which a utility's facilities were installed or attached to real estate belonging to others, state courts have found that the facilities remained personal property. See Bangor-Hydro Electric v. Johnson, 226 A.2d 371 (Me. 1967); United Electric Light v. Deliso Const. Co., 52 N.E.2d 353 (Mass. 1943).

HUD and NRHA, however, point to a letter that C&P wrote to the Virginia Commissioner of Revenue requesting that its property be taxed as real property. That it wished its facilities to be treated for purposes of ad valorem taxation as if they were realty is not inconsistent with an intention at the time of installation that the facilities remain

its personal property subject to its control and possible removal. Indeed, if the facilities had become part of the real estate to which they were attached, C&P should have been subject to no ad valorem taxation upon them, for they would not have been the property of C&P.

This result is consistent with the purpose of the personal property limitation. The former owners of land acquired for the redevelopment project are compensated through a purchase agreement or a condemnation proceeding. By agreement, there might be a severance of a fixture and its reconversion to personalty, but once real estate has been sold and paid for, it is no longer subject to removal by the former owner. The Act thus contemplates no reimbursement of expense in

connection with the removal of non-removable real estate. It is limited to the expense of removal of personal property, for the owner is not otherwise compensated for that expense. There is no possibility of double compensation here, for C&P did not sell any land, and it received no compensation through any sale or condemnation.

We reverse and remand this case for further proceedings consistent with this opinion.

REVERSED AND REMANDED

TESTIMONY OF RICHARD TUCKER

DIRECT EXAMINATION

(TR-29)

BY MR. GREER:

Q. Would you state your name, please, sir?

A. Richard Tucker.

Q. Mr. Tucker, would you tell us by whom you are employed, and in what position?

A. C & P Telephone Company, engineering department. Field engineer.

Q. And back in 1972, 1973 through 1976, what position were you?

A. Same position, sir, except I was in another group which had responsibility for downtown Norfolk.

Q. Now, Mr. Tucker, in connection

with your position with C & P Telephone Company, did you have any connection with the work which was done on what we are calling here the relocated facilities within some Redevelopment, urban redevelopment area?

A. Yes, sir.

Q. Which were those.

A. Olney Road and Llewellyn Avenue, the main two jobs, and part of the Olney Road job was a portion of the responsibility in order to feed Ghent, which was done later.

Q. And I know you don't have it before you--

MR. GREER: If Your Honor please, we have listed on Exhibit 2 for identification on Olney Road, the

C & P number on that is 2109.

THE COURT: You mean of the road itself?

MR. GREER: That's what it is called, Olney Road job project, which we have separate plans on is this portion here. C & P, 2109. And I give these numbers because some of the other exhibits refer to them. Llewellyn Avenue is 1304.

THE COURT: Wait a minute.

You couldn't call it something easy like Llewellyn Avenue job, could you?

Go ahead.

BY MR. GREER:

Q. Then, Mr. Tucker, in connection with other work, did you at my request review the drawings and plans and engineering plans on the other jobs that were

involved?

A. Yes, sir.

Q. What were they?

A. They were Berkley and Rosemont.

MR. GREER: If Your Honor please, those numbers, Rosemont is 2171.

Berkley is 3327.

THE COURT: 2237?

MR. GREER: Excuse me. 3327 is Berkley.

BY MR. GREER:

Q. And did the Ghent area include what has been

(TR-31)

termed the Botetourt Gardens, or West Avenue?

A. Yes, sir.

MR. GREER: That's 1677, your Honor.

THE COURT: And you call that what?

MR. GREER: Botetourt Gardens.

BY MR. GREER:

Q. Now, Mr. Tucker, drawing your attention first to Llewellyn Avenue, as shown on Exhibit No. 3, do the, or what is shown as the old equipment and the old Llewellyn and the new Llewellyn?

A. Well, the old Llewellyn Avenue is the red line. We had an underground conduit run, which is pipes laid in ground so we can pull cables at any time without digging up the ground again with manholes to make access to certain locations along the ramp.

There were in that area pole lines, but they were removed, and this was just part of the job for removal. People

moving out of the houses. And they were relocated to the new Llewellyn Avenue.

THE COURT: What was relocated to the -- the conduit and manholes or the --

THE WITNESS: Conduit, manholes and cables which were in the conduits.

BY MR. GREER:

Q. How is that shown on Exhibit No. 3?

(TR-32)

A. They were relocated into the same type structure, being underground conduit and manhole route along the new Llewellyn Avenue between Princess Anne Road and 19th Street.

Q. Is that shown in green on this No. 3?

A. Yes, sir.

Q. And is the old shown in red?

A. Yes, sir.

Q. All right. And you mentioned that the lines -- can you just describe a little more as to the actual type of lines or equipment that was relocated?

A. Well, underground conduit and manholes are structures that we put on main routes so that it is not necessary to dig up the ground along the main routes within the City. And where we have major cable lines within the conduits, we have normally large cables that run 1 inch to over 3 inches in diameter.

Q. What is within the cables. What do they consist of?

A. Individual wires. Anywhere from 100 to 3600 pairs of wires. 7200 individual lines that feed the facilities to subscribers in a good portion of the

northern area of Norfolk.

Q. How about any pertinent equipment, relays or anything else like that involved?

(TR-33)

A. No, sir. And I don't know if they fell in this particular area. But we have a, what amounts to a VEPCO transformer. They are load coils which enhance the transmission properties of the cable. If they were in that location, they would also have to have been relocated.

Q. Now, in regard to that, with whom did you work insofar as making this relocation and doing the work, getting it replaced and so on?

A. Three people that Norfolk Redevelopment -- the main contacts, Bob Kunkler I worked with more than anybody

else.

****

(TR-33)

THE WITNESS: And Fred Ewell.

THE COURT: Is he with Norfolk Redevelopment?

THE WITNESS: Yes, sir.

And Dennis Richardson, I believe. I don't remember how much contact I had with each individual, but I know Mr. Kunkler was my main contact.

****

(TR-33)

Q. How about any contact with anyone of the City?

(TR-34)

A. No, sir. The only contact that I remember even may have been with the City would have been in a joint preconstruction

meeting that is held prior to all jobs.

Q. Now, Mr. Tucker, in regard to the other job, going first to what has been described as Botetourt Gardens, which is below there, does Exhibit No. 3 show again the work that was done?

A. Yes, sir.

Q. And again, if I may, just to shorten it, the red, does the red show the old work and the green the new?

A. Yes, sir.

Q. And did you review those project plans?

A. Yes, sir.

Q. Now, in connection with that, could you explain to the Court, if you will, and I think if you can show on this, transferring over to Exhibit 2, which gives the complete, again, what was done

and what was made necessary insofar as any work down here in Duke Street, Olney Road. Just tell the Court where?

A. Well, there were two old routes which were on the old Duke Street and Llewellyn Avenue to Westover Avenue.

Q. Is that what is shown in red here?

A. Yes, sir. When those streets were to be

(TR-35)

closed, the property would then have fallen in what was to be constructed as apartments and townhouses and the like. And our existing conduit and cable runs would have then been located beneath those structures. So it was necessary for us to relocate those, and the only way to do it was to construct a new line from Boush

Street down Olney Road to intercept those existing feeder cables and reroute them up the proposed Botetourt Gardens to an intersection of Westover Avenue.

Q. Now, when you described from Boush Street, can you give us a description then if we are talking about what intersection is this? Can you see it from there?

A. That is Duke Street. And we have runs, lines that come down Duke Street and continued on. What is now the red line was the old Duke Street. And we had lines coming down Boush, which continue on to Llewellyn Avenue, which is the right end of the green line.

Q. That's the right end right there?

A. Yes, sir.

And since those lines continue on

to Westover, Duke and Duncan Streets, which were to be closed, and we had to intercept those lines at those two points, the intersection of Llewellyn, or rather Boush Street and Olney Road and Duke Street and Olney Road and relocate them to a new run which intercepted the northern ends of

(TR-36)

the two red lines, which were to be removed.

Q. And can you say whether or not this was necessary to get back to your feeders or your main plant?

A. Yes, sir. Without that we had no way to intercept the existing lines and extend them to what would stay on Westover Avenue.

Q. And then describing, so the

record would have it, from Duke Street down Olney to Botetourt, the old Botetourt Road, or as it turns out, what you mean is we have a little loop there?

A. Yes, sir. That's the new line extended down the new conduit and cable runs that were extended on Olney in order to pick up the existing facilities.

Q. And if we go back to this, this shows the same thing on Exhibit 3, does it not?

A. Yes, sir.

Q. And then the new line is the one running up in Botetourt Gardens?

A. Yes, sir.

Q. Now, I don't think I asked you, but what about going back to Llewellyn Avenue a moment. What happened to the old Llewellyn Avenue?

A. The old Llewellyn Avenue was closed and it's now a portion of Maury High School athletic field.

Q. Then did you also, Mr. Tucker, review for me

(TR-37)

the -- let me ask you this. What type of equipment was involved in what we termed the Botetourt Gardens?

A. It was a similar structure. Underground conduit with cables.

Q. Same type?

A. Same type as Llewellyn Avenue.

Q. Now, drawing your attention to Olney Road, which I believe was the job you were involved in?

A. Yes, sir.

Q. Can you tell us from this Exhibit No. 2, what was the work done on that?

A. Well, the north side, which is the red line of Olney Road, was redeveloped and allowed us no location to extend our lines to the western area around Norfolk General Hospital, because Colley Avenue was going to be rerouted, and it was part of the long range plan, as I understand it, so we were forced to relocate to the opposite side of the street where we had space, under the widening program.

Q. Is this rerouting of Colley shown on this curb black?

A. Yes, sir.

Q. And that was the old Manteo Street that ran in there originally?

A. Right. Yes, sir.

(TR-38)

Q. So your work came down to where?

A. It came down to what is, came down to Manteo, or which is now approximately the middle of the relocated Colley Avenue.

Q. And again, what type of equipment was involved there?

A. All underground conduits which have cable feeding that area of the city.

Q. Mr. Tucker, you also on the -- excuse me. I will put it up here.

A. That's all right. I can see.

Q. On what has been termed the Rosemont job, can you tell us what was done there insofar as the location, and I am again referring to Exhibit 4, and just the same stage, setting the same stage, does the red show the old work and the green the new?

A. Yes, sir.

Q. Tell us, if you will, what type of a job that was out there, and just what occurred, and what type of equipment was in there?

A. There was -- this was a portion of buried cable and aerial. I think the majority of it was buried cable. Buried being the trench is opened in the ground and the cable is directly laid into that trench and covered up with dirt. And there is no conduit involved

(TR-39)

whereby you can replace that cable without having to dig the ground again.

THE COURT: Is that the new work was buried cable?

THE WITNESS: Both, sir. The old and the new.

BY MR. GREER:

Q. By buried cable, again, maybe it is obvious to you, but what is within the cable?

A. It's the same type cable generally as we put in the conduit, is generally a type, or plastic covering on the outside with up to 3600 pairs of wires on the inside.

Q. All right.

A. And this was relocated to the new street, the old streets with the red line, the cables were existing.

Q. Is that Republican Avenue and Edward Street as shown here, and Scranton Street?

A. Yes, sir. They were to be closed and new streets were built -- I can't quite read the name of it. I am not that familiar with the area where the new cable

was placed.

Q. I think that is called East Tanners Creek Drive?

(TR-40)

A. And the one going toward Military Highway is Longdale.

Q. Longdale?

A. We had to relocate onto those two proposed streets in order to maintain our service to the Military Highway area.

Q. All right. And then so the work in green was necessary in order to facilitate or make it operational?

A. Yes, sir. In order to maintain that service.

Q. Then one other and I will get back to general questions. On Berkley, what has been referred to as Berkley, which is Exhibit 5 as shown here, this

way, really, in red and green, again, what type of equipment was involved there?

A. The existing equipment was aerial and it was to be located, or relocated, to be buried, I believe it was direct buried, which again did not include conduits.

Q. That was cable that was buried?

A. Yes, sir. The cables were in the air and we were asked to remove them. The first portion of the job had to be removed because the streets were redesigned and that portion of the triangle on the right hand side were the -- yes, sir. Approximately the corner of Appamattox and Berkley Avenue. A portion of Berkley Avenue was

(TR-41)

closed and our aerial line in that area had to be removed so it wouldn't be in the

street.

Q. I know the term aerial probably is self-explanatory, but what do you mean by aerial?

A. Pole lines which hold the cables running in the air.

Q. Now, with the equipment such as the cable and lines in the cable, is that removable type of equipment, or what?

A. The cables are, yes, sir.

Q. And as a matter of fact, what does the telephone company do when it is moving something like that?

A. The old cable is salvaged.

THE COURT: The conduit -- you don't try to take up any conduit?

THE WITNESS: No, sir. Conduits and manholes. The manholes are broken up and filled with dirt and covered over, and

the conduits are abandoned in place.

BY MR. GREER:

Q. On the cable, is any of it reuseable?

A. Very little of it. It is more expensive to try to maintain the cable in order to remove it and save it than it is to replace it with new cable.

Q. Now, in regard to the terms, you have explained lines and cables and all. What does the term

(TR-42)

central office equipment mean, or include?

A. Central office equipment is switching equipment which is normally a fairly large building, and housing electronic equipment. The newer equipment is electronic, which allows any telephone in the system to be switched or connected

to any other telephone in or out of the city.

Q. And the term, wire lines and pole lines, is that what you have described both as cable or individual lines?

A. Wire lines are the cable, the wires which are inside the cable, 3600 pairs of wires I was speaking of, and the pole lines and aerial are the structure which hold the aerial cable.

Q. Now, insofar as the work which was done, was that in accord with these plans which --

MR. GREER: Your Honor, these are Exhibits 11 through 15, which are the more detailed plans that we tried to translate to these drawings.

THE COURT: Exhibits 11 through

15 are the plans by which the reinstallation was put in. Is that what you are saying?

MR. GREER: Both removal and reinstallation.

THE COURT: Go ahead, sir.

(Plans for removal and installation of cables were marked Plaintiff's Exhibit Nos. 11 through 15, respectively, and received in evidence.) (TR-43)

BY MR. GREER:

Q. My question, were they done as drawn?

A. Yes, sir.

Q. And insofar as implementing the work and doing this work that you

described, generally, and as is shown here, was this all by your working with Mr. Kunkler?

A. Yes, sir.

Q. And approved by the redevelopment authority?

A. Yes, sir. Through contractors, Baldwin & Greg -- McGaughy, Marshall & McMillan, architect on Llewellyn Avenue, I believe it was.

Q. Who did the drawing?

A. They did the detailed plans, because they were doing the road jobs in those areas, and in order to minimize conflicts and location of cables and conduits, we hired them to also locate our facilities.

****

(TR-44)

Q. Is the term station equipment, does that --

A. Station equipment is small wire, individual wires and telephones which are in the individual residence or business. It relates to telephone sets and the wiring in the house.

****

CROSS-EXAMINATION

(TR-45)

BY MR. CRENSHAW:

Q. Now, the telephone company follows things like public notices about redevelopment projects; does it not?

A. Yes, sir.

Q. And if you see one of those, isn't it your practice to call the authority and find out what the proposals are?

A. We stay in pretty close contact with them.

Q. And you say in this you hadn't contacted the city very much. Do you contact the city at all about these plans, or about street closures?

A. Normally the cities plan for closing a

(TR-46)

street is in advance and we hear from them before we know of it any other way.

Q. So the city contacts you directly when they propose to get ready for this?

A. Yes, sir.

Q. And that's a routine thing. You always get that notice?

A. Yes, sir.

****

(TR-47)

Q. If the city, for example, has a project that it is widening the street, or changing the grade of a street, is it unusual, or an usual occurrence that you would be contacted and asked to accommodate your lines to whatever new work the city was doing?

A. We would be contacted. There is a, in my job, I think it was 8 years, I don't remember a case where we had to, for the city, relocate anything. We had very

(TR-48)

minor adjustments of conduit runs.

As I remember, we have always been able to work out some method by which the work could be done without a great expense.

Q. But if it was done, the telephone company did bear that expense?

A. Yes, sir.

****

(TR-49)

Q. So the telephone company owns all the lines that are talked about here?

A. Yes, sir.

Q. And would you say these are transmission lines as opposed to local distribution lines?

A. The majority of them are local distribution lines.

Q. You say that the local distribution lines -- but that would mean as far as -- the location means the whole northern part of the city of Norfolk?

A. Yes, sir.

Q. Far beyond the confines of this redevelopment project area?

A. Yes, sir.

Q. That would be true for all of the lines we are speaking of?

A. Yes, sir.

Q. Now, when you put those lines in the conduit, say along Olney Road, along Llewellyn, did the authority

(TR-50)

grant an easement to the telephone company for this?

A. Yes, sir.

Q. So that before this work you were in the right-of-way, so to speak, under your franchise?

A. Yes, sir.

Q. But afterward you had an easement of your own?

A. Yes, sir.

Q. So now you have a vested property right to be where you are?

A. As I remember, that's true.

MR. GREER: I think he is asking a legal question there. He can ask him what he did, but --

BY MR. CRENSHAW:

Q. With respect to that line, can you tell me what it is that you had to do to lay the conduit? For example, do you have to dig a trench?

A. Yes, sir. A trench is dug for the length of the project.

Q. About how deep and how wide is that trench?

A. Basically we maintain two feet, try to maintain 24 inches of cover from the ground level to the top of the structure. The structure being the conduit and cables.

Q. Now, the structure that you

mentioned, can

(TR-51)

you describe how that -- suppose it was, say a 16 pair, is that a proper term, cable?

A. It was a 16 way conduit.

Q. 16 way conduit?

A. Yes, sir.

Q. What does that mean?

A. It means that basically, unless we have problems, we would place 16 individual pipes side by side and one over the other to form approximately a 4 x 4 pipe way.

Q. All right.

A. And this would be laid in the ground to whatever depth it was necessary to maintain two feet of cover.

Q. Now, if you came along, and

suppose there was a water line that crossed the path that you wished to follow, what would you do about that?

A. We would have to dip under the water line.

Q. And about how deep would you go on occasion for that?

A. We try our best to maintain one foot of separation.

Q. So you go to whatever level was necessary to get under that line?

A. Yes, sir.

****

(TR-53)

Q. The conduits are pipes as such, and they are normally four inches in diameter on the inside diameter.

Q. Made of what?

A. They are made of -- what we use

now is plastic.

Q. Now, is this the way the -- excuse me. Go ahead. So that you dig a trench?

A. Yes, sir.

Q. Do you put anything at the bottom of the trench?

A. Depends on the, putting in the footing in the trench. If the soil is good, we don't need any base. If it's a very poor soil, we have to use some type of base.

Q. Some type base?

A. Yes, sir.

Q. To support your pipes?

A. Yes, sir, to keep it from changing in elevation.

Q. How long is each one of these pipes?

A. The ones we use normally come in

sections of 20 foot lengths, I believe.

Q. How are they connected?

A. They are connected by glue, the plastic is.

(TR-54)

There is a glue which is put around the outside and just placed together, and the glue holds very quickly.

Q. Now, say if you were having say a 20 conduit, or whatever you call it, 20 pipes?

A. 20 way.

Q. Do you have say 5 of them piled 4 deep, or 4 piled 5 deep, or sort of symmetrical like that, or laid out flat?

A. No, sir. Fairly square unless we come to an obstruction.

Q. And you lay the pipe in a trench maybe on a base, or not, depending on the soil?

A. Yes, sir.

Q. And you put those in and connect them together, I suppose?

A. Yes.

Q. Do you put anything in there to hold them down or to make it more rigid or --

A. No, sir. The only time we put, we encase them in concrete, if it is necessary, and this would be if you are crossing a roadway where there may be a strength needed to support some kind of large, heavy structure.

****

(TR-55)

Q. Now, how long do these series of 20 foot pipes extend? Where do they go, for example? What starts and stops along that line?

A. There are manholes all between the locations, and the distance between the manholes are designated due to length of cable. We can -- it is only economical to order cable in designated lengths, depending on the size of the cable we would need. If we used a larger reel to place the cable on, we would need special equipment to handle it.

Q. Okay, So that what you do then, you would have a certain, at periodic intervals you would have a manhole. You referred to these as a structure. Could you give me a rough dimension of that kind of structure?

A. Yes, sir. The basic manhole, unless for some reason it had to be larger, is approximately 12 feet long and 6 feet wide and 7 feet deep on the inside.

(TR-56)

Q. That is made of what kind of material?

A. Concrete.

Q. So is it just, in layman's terms, like a big septic tank, or something like that?

A. Yes, sir.

Q. Give you that kind of impression?

A. Yes, sir, with an access hole through the top.

Q. And what did you do, dig a hole and drop that in?

A. Depends on the location. If it is undisturbed land, no utilities in the area, we have what is called precast concrete holes, which come in sections, in halves or thirds. And you can dig the holes, support the hole, smooth out the

trench as such, and drop the hole in and put it together. If you don't have that situation, where the utilities in the city won't allow it, then we have to do what is called pouring in place. The sides are structured up with wood, and the concrete is poured in place in those open spaces to maintain the walls.

****

(TR-57)

THE WITNESS: Well, 14 feet is basic. 10 feet probably would be closer to the average hole.

BY MR. CRENSHAW:

Q. I said it the wrong way. Ten feet is lateral, not up and down?

A. No, sir. 7 feet deep.

Q. And 12 feet long and 6 feet wide?

A. Yes, sir. And the walls or roof and floor of the manhole is approximately a foot.

Q. A foot thick?

A. Yes, sir. That's two feet.

Q. And then you got the pipes you got to put in and cover them back up with dirt, or something like that, to protect them?

(TR-58)

A. Yes, sir.

Q. And there is about a 2 foot layer over that?

A. Yes, sir.

Q. How do you get them into the manhole?

A. There are open -- windows, we call them, made into the sides of the hole at whichever direction the conduit is to be entered.

Q. So now if you have two manholes, and pipes between them, you are set, but

if you don't have any line in there, how do you get the cables in there?

A. That's what the pipes are for. It maintains an open air space when the manhole and a line is fished through this conduit, which may be an average of 2 to 500 feet in length. Some longer, some shorter. And a piece of wire is pushed through the pipe, which gives us the ability to pull through a large cable.

Q. Now, these cables that you pull through, is there one cable in each of the four inch pipes, or more than one?

A. Depends on the size of the cable. There is a possibility that more than one could be. But in the urban city, normally what we call full size cables are placed in each conduit.

Q. I understood you earlier to say that the cables vary from 1 inch to over 3 inches?

(TR-59)

A. Over 3 inches, yes, sir.

Q. If you put in one over 3 inches, that's the only thing you put in a four inch?

A. Yes, sir.

Q. But if you put in a smaller one, you would put more than that?

A. It is possible.

Q. Once you put that thing in there, what is the ordinary life of that cable?

A. 40 years.

Q. 40 years?

A. Yes, sir.

Q. When you put it in there, do you pull it out to service it or anything like

that?

A. No, sir.

Q. During that 40 years?

A. No, sir.

Q. So you put it in and expect it to stay there that length of time?

A. Yes, sir.

****

(TR-61)

Q. So once you get the line, the trench dug and the conduit pipe laid in it, and the manholes connected, and then you pull the line through, then that unit is set and you don't expect to go back into that unit unless you have some kind of trouble. Would that be fair to say?

A. Not always just for trouble. We may have got like in the Ghent area where houses are, apartments, whatever, are

being built, and we may have to go into that piece of cable in order to gather pairs for that subdivision.

Q. So you might have to increase the amount of service that's available?

A. Yes, sir.

Q. Now, the telephone company has quite a long

(TR-62)

range planning activity; does it not?

A. Yes, sir.

Q. And in that, don't you have estimations of population movements within the community such as Norfolk?

A. Yes, sir.

Q. And don't you spend a lot of time trying to estimate where subdivisions are going to grow and people are going to move and that kind of thing?

A. Yes, sir.

****

Q. Would it be expected that the telephone company would inquire as to the number of houses that would be expected in the Ghent Square area?

A. After we find out there is going to be redevelopment, yes, sir.

****

(TR-63)

But whenever the plan was adopted, at that time would it have been normal to expect an inquiry from your company to the Housing Authority as to what redevelopment activities were expected in that area?

A. Yes, sir.

Q. Do you remember such an inquiry having been actually made?

A. We received a letter saying there was going to be street changes in that area.

Q. And did you find out how many homes they expected to build in that area?

A. An estimate.

****

(TR-65)

Q. Now, those number of ducts, would they be what the company estimated as necessary to serve the projected development of the area say between Olney Road and 21st Street?

A. No, sir. It would maintain service much further beyond that. We have to serve areas further north in the city.

Q. But they would include that in the planning?

A. Yes, sir.

Q. So whatever projected growth that you had reason to believe might occur, you would crank into the sizing of the facilities that you put into the streets?

****

Q. Now, the cable that you put in would be sufficient to serve about how many years in advance?

A. The cables, we try not to extend our cables beyond ten years. But when a cable is necessary, we size

(TR-66)

the cable for a 10 years growth.

****

Q. You wouldn't pull out the old ones and put in a new one, would you?

A. Not unless it was a very small cable or there was something wrong with it.

Q. So basically when you put them in there, they are in there to stay?

A. Yes, sir.

****

(TR-69)

A. This, and I am not familiar with this type of drawing. It's not the type work we normally do. This, as I understand it, is mean low water. And this is measurements from that point. This is ground level. So we are in essence about two to two and a half feet below ground level.

Q. The top part, the highest part of your pipe is about two and a half feet below ground level?

A. Yes, sir.

****

(TR-72)

A. Yes, sir.

Q. Up in the upper left-hand corner there is a drawing with a lot of little circles in it that it indicates, proposed 18 duct plan?

A. Yes, sir.

Q. Is that the way your 18 ducts are lined up for that line?

A. Yes, sir. Called stacking.

Q. Stacking?

A. Yes, sir. We stack one over the other in this manner.

Q. Would that indicate that 18 ducts were carried from Olney Road, on up from Olney Road manhole to

(TR-73)

the manhole of Boissevain Avenue?

A. Yes, sir.

Q. Now, you continue through that

same thing up to a manhole at Raleigh Avenue?

A. Yes, sir.

Q. And then another one up to the manhole shown in the right-of-way of Westover Avenue?

A. Yes, sir.

Q. So that the top part of this drawing and the back part of Exhibit No. 12 explains the location from a plan as looking down from an airplane on your plan?

A. Yes, sir.

Q. Now, the bottom part of this drawing is sort of on a graph paper and shows a wavy line. What does that purport to do?

A. That's a profile which gives the depth of the proposed structure, the

conduit.

Q. Okay. Now, why is it that it goes up and down so much?

A. The reason it looks the way it does here is because of the manholes - in order to enter into the manhole, the top of the manhole is approximately already two feet below ground level and the entrance into the manhole itself must be approximately midway of the entire opening, which is about 7 feet. So the conduit has to dip

(TR-74)

down to that location in order to end up in the manhole.

****

(TR-75)

Q. Okay. Now, do these drawings show you the approximate dimensions of one

of these groupings of ducts? For example, 18 pair of duct, about what size is it in the ground?

A. I have to figure it out. Each one of them is a little better than four inches outside dimension. Add three of them it would be 12 with 3 inches of concrete around it. So it would be around 14 to 16 inches wide and probably 3 feet deep or so.

Q. Okay. That was the conduit pipes and concrete inside of it?

A. The concrete is on the outside for extra support of the conduit.

Q. Now then, these plans would tend to show those things for each one of the projects, would it not?

A. Yes, sir.

Q. And they probably would actually

have the dimensions of the conduit if we needed it. I mean, precisely?

A. Yes, sir. A summary on the right-hand side of each one of the drawings which list the detail measurements and numbers of the individual types of

(TR-76)

material that was used.

Q. Okay. So that for the Llewellyn Street relocation here, the things that you did were you constructed in the green line the manholes, the conduits, and then later put the cables into it?

A. Yes, sir.

Q. Okay. Did you take anything out of the red line?

A. Yes, sir. We pulled the cables out.

Q. You pulled the cable out?

A. Yes, sir.

Q. But the rest of it you left alone?

A. We knocked the tops off of the manholes and we have what is called a frame and cover which gives us access to the manhole. You can see the grills in the streets and along the sides. Those are removed. The collars are knocked off, which gives us the 2 foot depth to the top of the hole. The roof of the hole is normally knocked off, filled up with sand or some compactible material and abandoned under the ground.

Q. So the only thing pulled out is the cable?

A. Yes, sir.

Q. What was done with that cable?

A. They are junked.

Q. Junked?

(TR-77)

A. Yes, sir. And we had salvage value for the copper and lead in the cables.

****

(TR-80)

Q. Okay. Now then, with respect to Olney Road, which is best shown on Plaintiff's Exhibit No. 2, Olney Road was never closed, was it?

A. No, sir.

****

Q. Now, why was it that the plant was moved from the northern side of Olney Road to the southern side of Olney Road?

A. Redevelopment requested that they

no longer wanted us on that side of the street due to what was both in and what was going to be in that area, as I remember, and that we had no way to reinforce the conduit on that side of the street and maintain service for what was projected as growth in the hospital area and beyond.

Q. When the Authority communicated that to you,

(TR-81)

you were in Olney Road under a franchise issued by the city?

A. Yes, sir.

Q. Is that correct?

A. Yes, sir.

Q. Why then would you move because the Authority asked you to move?

A. It was all part of the project.

Just normal way that we have of doing the project at that time.

Q. And you knew City Council approved the project?

A. Yes, sir.

****

(TR-83)

Now, if you were just substituting for this line, could you have just put the green line from that manhole down the southern side of Olney and brought it up to this manhole here if you were simply substituting?

A. Substituting?

Q. I mean, if you were simply relocating this line southwardly and not doing anything else?

A. With no regard to the rest of the project.

Q. No regard to anything else except that line?

A. Yes, sir.

Q. You could have simply moved it down?

A. Yes, sir.

Q. But you didn't do that?

A. No, sir, we couldn't.

Q. Why couldn't you?

A. We had to maintain service to the remainder of the City which flowed over the old Duke Street, Duncan and Westover Avenue, which was being closed.

Q. So that your overall service requirements or transmission requirements required you to do differently on the southern side of Olney Road than was necessary simply by the movement of the northern line to the southern line?

A. Yes, sir.

(TR-84)

Q. Okay. Now, did you have more ducts in there, or fewer, or the same number, or do you know?

A. In the new line as opposed to the old? Yes, sir. We placed more.

Q. Did you crank in, in your consideration of the new line along Olney Road, did the fact that the medical center with the projected employment of some 11,000 people, did that have anything to do with your estimation of how much cable to provide?

A. Not cable. Conduit, yes, sir.

****

Q. Okay. And here again, you would use as much information as you had about the various parts of the City that were

going to grow, or not grow, in determining how much conduit to lay, because you don't want to go back later and put it in, do you?

A. That's right.

Q. So you knew you would have to put in more conduit than you might need, rather than less?

A. We hoped we didn't spend the extra money, or nothing, but we try not to be too low.

Q. You mentioned, I think, that your cable

(TR-85)

requirement is based on a ten year projection. Is your conduit requirement based on a longer projection than that?

A. Yes, sir.

Q. About how long?

A. It depends on economics and what we feel like the change of the area is going to be. We try to put in the downtown area what we feel like is going to last us indefinitely, because it costs so much to go in the ground.

Q. When you order the cables to go into these new lines, about what is the lead time for the preparation of one of those?

A. The cable is ordered by lengths due to not being able to cut the cable between manholes. And we have to have a single piece of cable between the two manholes, so it has to be manufactured as we order it. And therefore the ordering period to shipment is approximately three months for large size cables.

Q. So that when you get ready to do

these things, you know exactly what kind of cable you are going to put in each of the conduit, and you order that and put it in?

A. We don't order it. We make up the projected plan when we are dealing in brand new conduit runs, but don't actually order the cable until the conduit is actually in place. We may run into obstructions in the

(TR-86)

ground and we have to move a manhole. So if it is relocated, that length of cable would not be usable at that location. So we don't acutally order it, to manufacture it until we have verified the lengths between the manhole.

****

(TR-94)

REDIRECT EXAMINATION

BY MR. GREER:

Q. Mr. Tucker, in regard to being asked about the lines and what they were serving as far as the local areas of Norfolk --

A. Yes, sir.

Q. And you gave us in categories of type of lines that would be used in that way, or are there certain categories such as direct service and trunking service and toll, and so on?

A. We have approximately -- we have basically three types service, talking about exchange cables which serve the individual customers who are within a geographic area, a given central office where the switching equipment is located.

We have trunking cables, which is

considered to be those cables which tie our individual central offices together, which give you the ability to dial from one section of the City to the other.

And we have toll cables, which are those

(TR-95)

cables which switch from the main central office, in this case down on Bute Street, to other cities to get us out of the immediate area.

Q. Do you know in these projects like Llewellyn and the others, out of the number of cables that you described, and so on, how many would be total?

A. Total cables in the entire job?

Q. Yes.

A. 12, 14.

Q. And that's all the jobs you are

speaking of?

A. I am speaking of the Ghent, relocation of Llewellyn Avenue, Westover and Ghent and Olney Road.

Q. Out of how many total?

A. All of those I think that was involved, approximately 12 to 14 cables. I would have to go back to the prints.

Q. I said, how many total altogether when you include the trunking and the others. Is there any way of --

A. I don't know. I believe we have probably 18 cables, or maybe better in Llewellyn run when the job started.

Q. All right. Now, of those 18, what I am getting at, of those 18, how many there would be a toll?

A. Out of the 18, how many would have been

relocated?

Q. No. How many would be toll?

A. Toll. Excuse me. I misunderstood. The toll cables, as far as I can remember, there was only one toll cable in there. That went to Newport News.

Q. But going back, this would still, in this relocation, to get the service being relocated, this was all necessary to put that type of service in, was it not?

A. Yes, sir.

Q. Now, you were asked about a term, about when you first went into there, before some maybe streets actually closed or after they were closed, but before the project was reopened, about an easement. Actually that was under a letter of right

of entry; was it not?

A. I don't remember the terms, sir.

Q. You do not?

A. No, sir.

Q. And you may not have -- did you ever see this letter, and this is Exhibit 28 A, which has not been introduced yet. I don't know if you can -- did you ever see this letter from the Authority to Mr. Pittman?

A. No, sir. He worked in the group which was responsible for the toll and trunking, and I wasn't involved with it.

Q. All right. Now, in the cable that you

(TR-97)

described, without going through the description again of running anywhere from 1 inch to 3 inch, that can be removed

from the conduit, can it not?

A. Yes, sir.

Q. And --

A. Not in a workable condition, normally.

Q. This is what I am getting at. And in regard to that, what do you do if you have trouble in that cable? Say if you take -- let's take a run from one manhole of 500 feet, and you got 1 inch or 3 inch cable, and you have a complete breakdown of it, for instance?

A. Complete breakdown, we would place a complete cable in a spare conduit and cut the two ends around to what would remain, and pull the old cable out, disconnect it and pull it out. Every case is individual.

There may be a case where it is

determined that you might dig outside of the manhole, or locate the trouble at some distance between the manholes and dig up the area and repair the cable and leave it in place. It would be much more economical to do that.

But if the damage was so severe that that couldn't be done, the cable is removed and replaced.

Q. All right. And when you use the term junk, you made a distinction between junk and salvage, and I am not sure on that. What is the engineer on the C & P terms,

(TR-98)

what do the two mean?

A. Most of it, when I think about salvageable cable, it is cable that can be reused. Junk cable cannot be reused. It

is cut up and junked and we get a value from that cable, depending on what it is.

Q. These -- maybe I might have misused the term salvageable. But you use the term differently. You do get the value of that?

A. We have a salvage value of the cable.

Q. Material value from it?

A. Yes, sir.

Q. And did, in fact, on these, did you pull the old cables out on these jobs?

A. Yes, sir. There are very -- I have no idea if we ran into this. I don't remember. They are very isolated cables. Due to the condition of the conduit, it is impossible to remove the cable. When that can't be done, we just leave them.

Q. Now, insofar as why you do not

reuse cables, say if you had one for a certain run and it had been there two years, but you pull it out for relocation, or whatever, why do you not use that?

A. Basically due to differences in measurements from one manhole and the handling costs. It would have to be wrapped back up on another reel and sent back to the

(TR-99)

storeroom and stocked in the storeroom until such point that you would be able to use it.

But normally a new conduit structure such as these in the city, we probably follow the manhole sections between manholes, or longer than what was existing, so the cable wouldn't be reusable.

Q. And insofar as the projection, you were asked about that -- and planning ahead is what I mean by projection, for population, or use, and so on. I think you used the term of a ten year growth. What were you speaking of there in regard to, or what are the limits of growth when you figure on a cable?

A. When a cable -- when it is determined that a cable is to be placed in any area, we size that cable to last a minimum of two years, and when it looks like the point will be more than ten years, then economic studies are made to verify whether or not that size cable should be reduced or not.

Normally when you get beyond ten, or at least fifteen years, the economics of the job are such that you would place a

smaller cable rather than run the expectancy life over that time.

Q. That runs from 2 to 10 then, generally?

A. Yes, sir.

Q. Are you familiar with the term "betterment?"

(TR-100)

A. Yes, sir.

Q. And what is that?

A. Betterment is that amount of cable or conduit that is placed in to a new location when an old smaller cable or conduit is removed. Betterment is over and above the in place replacement, existing replacement.

Q. All right. For maybe what a layman or non-engineer calls improved facility?

A. Yes, sir. It would be improvements if you have 500 pairs of cable and you were to replace it and put 1,000 pairs in, then the extra 500 would be betterment.

Q. Now, insofar as the -- you said you pull out the old cable. When, in actually doing the job, what would be the sequence of that? Do you get everything replaced? Do you cut if off, or what?

Just give the Court a little idea of that.

A. The first thing is the manholes are constructed to verify that we have them in a usable location. And the conduit is placed between the manholes, new cable is pulled in those sections, and then the new cable is cut at either end into what is going to remain, and the old

cables are pulled out. The old conduit, or the old manholes are covered up and the job is completed.

Q. But does the service continue?

A. The services always continue.

(TR-101)

Q. Then, insofar as the -- are they included in these, this type of material with what went in here -- I think the term pedestal I have seen used. Are any of the above ground locations -- I don't mean above ground.

A. I don't remember any pedestal work being done. Generally with buried cables of smaller sizes.

Q. Then you were asked specifically, on Olney Road, what was the, insofar as the "Olney Road job", the start of where it extended, and you said to the manhole

at Duke Street, right?

A. The Olney Road job.

Q. Olney Road job?

A. The Olney Road job started --

THE COURT: 400 feet east of the first one; didn't you say?

THE WITNESS: That was the first manhole. The conduit, actual job started on the west corner of Olney and Duke Street.

BY MR. GREER:

Q. Okay. Then I notice we do have both on this plat, and on the No. 3, I think it is, one behind here, again, you have some further work which is on to Virginia Beach Boulevard and a little bit south on Duke Street. What work was that as far as "job" is concerned? What was that in connection with?

(TR-102)

A. That was in connection with the Botetourt job where the cables had to be intercepted, that were now on Boush Street. The Boush Street cables fed on to Llewellyn Avenue a little further down by the Center Theater. But those had to be intercepted and there was no conduit available to intercept the cables at that time. So the conduit had to be placed between Boush Street, and the conduit where we stopped on the Olney Road job which was the west side of Duke Street.

Q. There that work appears on the "Botetourt Gardens" job?

A. Yes, sir.

Q. In regard to what you described earlier, station equipment, you remember that?

A. Yes, sir.

Q. You said that it would involve handsets and so on. What about what the handsets go to? What is the overall inclusion in station equipment?

A. Well, in the broad sense, everything includes station equipment. It would be telephones, and the wires in residences and businesses, which could include up to as large as a PBX.

Q. What is a PBX?

A. That's a private branch exchange switchboard with extensions from that switchboard to different rooms

(TR-103)

in the building, which may be as many as 1,000.

Q. You are talking about in businesses, depending on the size, varying

sizes?

A. Could be very large, yes, sir.

Q. Is that equipment property of the telephone company?

A. Yes, sir.

Q. And if a business moves or changes service, is that removed by the telephone company?

A. Yes, sir.

Q. And how about in the central office equipment, or switching equipment, I believe you used the term, you described that earlier. Is that type of equipment -- what if you change, say, from one office to another location, tear down one building and build another?

A. Equipment is removed.

Q. And removed to the other location?

A. Normally, new equipment is put in at the new location before the other can be removed.

Q. But it is removable equipment?

A. Yes, sir.

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TESTIMONY OF ROBERT R. KUNKLER

DIRECT EXAMINATION

(TR-104)

BY MR. GREER:

Q. Would you state your name, please, sir?

A. Robert R. Kunkler.

Q. By whom are you employed?

A. Norfolk Redevelopment and Housing Authority.

Q. What capacity?

A. I am a registered engineer in the Commonwealth of Virginia, and engineer for

the Authority.

Q. All right. And were you serving in that capacity back in the early 1970s?

(TR-105)

A. That is correct.

Q. And are you familiar with the work, without my detailing each and every one of them, the redevelopment work that was done in the Ghent area?

A. Yes, sir.

Q. And in the Rosemont area?

A. Fair. Pretty much in the Rosemont area, yes.

Q. And also the Berkley area?

A. Yes, sir.

A. Now, in regard to that, there are certain exhibits that have been prepared by Mr. Crenshaw's office being --

MR. GREER: These are the ones in

the book, Your Honor. 6, 7, A and B, and 9, which are called property maps.

BY MR. GREER:

If I may, Mr. Kunkler, just so the record will show these, I don't know if you helped prepare any of them or not, of the certain ones that have some colored areas, and Mr. Crenshaw can correct me if I am wrong, abutting certain of these streets involved?

A. Yes, sir. That's right.

Q. But insofar as the maps themselves, the dotted lines that are shown on the map would be the project lines; are they not?

(TR-106)

A. That's correct. In certain areas X'd, not to be acquired.

Q. That was my next question. We

have shown these for certain emphasis, Mr. Crenshaw did, but the rest of the property within these exhibits as shown within the dotted line would be property in fact acquired by Norfolk Redevelopment and Housing Authority, all except those that have the hash mark X's through them, is that correct?

A. That is correct.

Q. And this one I am showing you here is 7 B, which is East Ghent from 15th Street up Llewellyn Avenue up to 20th Street. And the same thing then would be --all right. This X, for instance, this big parcel, that I believe is Maury High School?

A. That is correct.

Q. That indicates that that was not acquired?

A. That is correct.

Q. And the same thing if we looked at Exhibit 7 A, we would find some parcels scattered around that literally have the hash mark X in it?

A. That is correct.

Q Then within the --

THE COURT: As luck would have it, I look at Exhibit 6 and that's got a piece that's even marked with green on it. It has an X in it. Does that mean it wasn't

(TR-107)

acquired?

THE WITNESS: I didn't notice that, Your Honor.

MR. CRENSHAW: If Your Honor please, I can answer. It was acquired. It was X'd because it wasn't shown on all

the exhibits and that shouldn't have gone in the Court's exhibit, simply because it didn't abut any of the streets involved.

THE COURT: All right, sir.

MR. GREER: One thing the stipulation doesn't show, they have colored only abutting certain streets for emphasis on that. But that's not the only land they acquired.

THE COURT: All right.

BY MR. GREER:

Q. Now, Mr. Kunkler, in regard to the overall project and program then, this land was acquired by Norfolk Redevelopment and Housing Authority?

A. Yes, sir.

Q. And the plan was to then, after certain things had been done, to turn it over for private development, or any other

type development, such as apartment houses, or whatever, isn't that correct?

A. That is correct. And certain public reuse.

Q. And in connection with that, the plan was to

(TR-108)

close certain streets and areas in order to have the property available for such use?

A. That is correct.

Q. And which specifically would include like Duncan and Duke, so that that area can be remapped and restructured, so to speak, for any type of new buildings and so on going in there?

A. That is correct. As a matter of fact, the Duke Street area was a low area. It was probably filled in, and it had to

be refilled and whatever when the road was closed, street was closed.

Q. And in the start of these projects, as with all the projects under this urban renewal, you would have an agreement with the City that looked forward to closing certain streets as petitioned for by the Authority in order to accomplish this plan; is that correct? And that in fact was done here?

A. Yes, sir.

Q. In doing that, the Norfolk Redevelopment and Housing Authority had no intention of ever allowing the C & P Company to keep their facilities in the old places, I will call them, that we see marked by red, did they?

A. I don't know whether I can answer that question specifically. I think the

problem was that normally if we could facilitate them with, allow them to

(TR-109)

stay, for whatever reason, then that was determined when we met with them, for whatever reason. But to move them per se, just because we had to move a road, or for whatever land we used, we normally work very closely with them, and if their plant can stay, for whatever reason, we allow it to stay.

Q. But when you say for whatever reason, in the redevelopment that you want to do in order to have the land and build on it, and not over facilities, and so on, then there is no intention of allowing C & P to keep any equipment there where it was at odd purpose or interferred with such redevelopment; was there?

A. That is correct. In one portion, perhaps, north of Princess Anne Road to Shirley Avenue, that was designated for residential use. But is could have been possible, possibly, that in the area that was an additional area created for Maury High School, there was an athletic area not to be built upon that, perhaps that line could have stayed.

Q. But it in fact did not stay. It was moved from Llewellyn to the new one?

A. At the option, as I recall, of C & P.

Q. Well, was that not at the option of the plan worked out with the Redevelopment Authority?

A. In our meetings, yes, sir.

(TR-110)

Q. And I don't mean that just one

day you say come in and go out. All this is planned?

A. Yes.

Q. And you participated in the planning?

A. Yes, sir, I did.

Q. And that was part of the plan to relocate those facilities, was it not?

A. That is correct.

Q. Now, also the Authority recognized that C & P, when they made these changes, that they had the right to and in fact did pull out all the old cable and any type of equipment like that?

A. Correct.

Q. So in all the planning and in talking there was never any question or contention made that any of that became the property of the Redevelopment

Authority?

A. Not to my knowledge, no.

Q. Were you familiar with the letter, not written by you, Mr. -- no, written by Jack Shiver.

Well, let me ask you this. When this work was being done and the Authority had the line, had the land, did the telephone company have permission to be running these lines in before they became streets?

Did they have permission from the Authority when it was your land?

(TR-111)

A. They may have. I don't know the exact time sequence on the various particular streets. Normally, the streets were closed in a sequence. Prior to relocation of utilities, normally the problem

of maintaining not only the telephone company but other utilities that were still in place became a factor with our coordination of all these closures with City agencies, Department of Public Works, Department of Utilities to maintain in this particular case maybe certain structures that were still on line, water and sewer and et cetera.

Q. So as to the exact time of closure, normally the roads would not be legally closed until certain property were acquired. Is that what is meant by the term, right of entry?

Q. For the C & P to do their work?

A. In some cases, yes, sir.

Q. And this is all in conjunction with the overall plan?

A. That is correct.

Q. And I believe, and you participated, on behalf of the Redevelopment Authority, and working with C & P as you indicated with others, but C & P that we are interested in having any of these relocation plans and facilities conform with what the Authority wanted in, and that would fit in with the project?

(TR-112)

The Authority and the City. Subsequently the City was a final approval on all of our project improvements?

A. Right, because the normal sequence of events, all projects have to be ultimately reviewed and signed off by the City.

Q. But also in that process, they are viewed and in effect signed off or approved by the Authority?

A. Well, yes. We are the coordinating agency.

Q. Was it also recognized in relocating the facilities from an engineer's standpoint they would have to be connected to a means to make them operational, that is to any existing facilities, or by means of bringing it back to the central locations and so on so they would be operational?

A. I worked very closely with Richard Tucker on coordinating the phases of the construction and how the conduits would be made and laid and how they would be relocated, and at what times, in our construction of the roads and utilities.

Q. And on the Olney Road area, which is Exhibit 2, Manteo Street was closed, was it not? That's the street run down

where the new Colley is indicated on here?

A. I believe it was between the two blocks north of Olney Road. I think it is Boissevain and Raleigh.

(TR-113)

From Raleigh south to Olney. I believe that was closed, or portions of the roadway were.

Q. Portions pretty much as shown here?

A. Yes, sir.

Q. This is not necessarily right to scale, but did the Redevelopment Authority acquire land along the south side for parks and so on on Olney Road?

A. Yes, sir, we did.

Q. And you also had the land within this project area on the north side, too?

A. We didn't acquire that. That

particular project is called the conservation project, and it doesn't mean that the land inside there is to be acquired. Only certain portions that warrants clearance, for whatever reason. In the way of a new road, or whatever. But for the most part, that is a conservation area and the properties are not to be acquired.

Q. That's on the north?

A. Yes.

Q. North side. But on the south side you did acquire?

A. We did acquire certain strips along Olney Road, yes, sir.

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CROSS-EXAMINATION

(TR-114)

BY MR. CRENSHAW:

Q. Mr. Kunkler, you mentioned

cooperative efforts or conferences. Did you meet with other agencies, representatives of other agencies in connection with the street relocations?

A. Yes, sir, we did. We normally meet with all pertinent City agencies to review the plan for their approval, since the roadway will be their ultimate responsibility.

For instance, the Department of Public Works, utilities, the other utilities that we normally contact would be, again, Virginia Electric and Power Company. Talk to fire alarm people for any circuits that would transit the project.

Q. You were sort of acting then as liaison or lead agency for the reconstruction of the streets?

A. That is correct.

****

(TR-115)

Q. With respect to the City, was the City constantly and thoroughly informed of new street patterns and new street locations?

A. Absolutely.

Q. Were consulting engineers hired in connection with the new streets?

A. Yes, sir.

Q. And do you remember the names of them?

A. Normally in this particular area we had Baldwin and Gregg responsible for the design of Olney Road within the boundaries of this particular project here. R-43, Ghent Conservation.

For the areas to the north,

Llewellyn Avenue and Botetourt Gardens, we engaged the services of McGaughy, Marshall & McMillan to do the design of project improvements.

Q. When those engineers would do the engineering work for the streets, would they also deal with the placing of the utility lines?

A. Utility lines? Concerning water and sewer, yes, sir.

Q. What about the private utilities such as the telephone company and VEPCO?

A. Normally, we were the coordinating agency for that. And the normal circumstances, we would furnish

(TR-116)

copies of the preliminary drawings and meet with the various utilities from time to time to inform them where we were, our

schedules for construction, and normally utility companies would engage and do their own design and put their own plan in a timely manner to fit our schedule of project improvements.

And in this particular case, due to the nature of the project and multitude of underground lines, the telephone company, in this case, opted to engage the services of each of the engineers to coordinate the design of the underground duct banks, to facilitate the underground construction of the ducts, to coordinate the work, to speed it along more smoothly.

Q. So the plans produced by the consulting engineers showed the street locations and the details of the street, and also the utility location for C & P and VEPCO?

A. That is correct. But the funds for the design of the duct banks were a separate contract by the telephone company.

Q. All right. Now, do you know whether copies of those plans were sent to the Authority?

A. Yes, sir, they were sent to us.

Q. Were they sent to the City?

A. To my knowledge, they were, but I can't --

(TR-117)

Q. You weren't involved in that?

A. No, I was not.

Q. With what department in the City did you work in connection with this?

A. I worked very closely with the Department of Public Works and Department of Utilities.

Q. Okay. Now, with respect to the Olney Road work, do you recall whether Virginia Electric and Power Company was involved, as well as Chesapeake and Potomac Telephone Company?

A. Yes, they were involved also.

Q. In relocating the line?

A. That is correct.

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TESTIMONY OF DAVID RICE

DIRECT EXAMINATION

(TR-125)

BY MR. CRENSHAW:

Q. Mr. Rice, would you please state your name and your title and your job description for the Court?

A. My name is David Rice. I am Executive Director of Norfolk Redevelopment and Housing Authority.

(TR-126)

Q. And what does the Executive Director do at the Housing Authority?

THE COURT: Don't ask him that. I mean, after all, that is to be condemning, probably.

Go ahead. Nothing.

THE WITNESS: I am responsible for the basic administration and running of the Redevelopment and Housing Authority under the direction of the Commissioners.

BY MR. CRENSHAW:

Q. Mr. Rice, are you familiar with the Ghent Neighborhood Conservation Project, East, West, North and South Redevelopment with Rosemont and with Berkley, two conservation and redevelopment projects?

A. Yes, sir.

Q. Could you explain to the Court in general terms the process that is followed in the adoption of one of the projects, plans for such a project such as the Ghent project?

A. Yes, sir. This is a little bit different process in the case of a conservation project which the Ghent project is. That really starts with the City of Norfolk asking the Redevelopment and Housing Authority to investigate the area because it is deteriorating, and to conduct a study to see if it is feasible to rehabilitate the majority of the properties in the project.

(TR-127)

The Authority undertakes that study, investigates the buildings as to their condition, their structural

soundness, whether or not we think that basically through private means the buildings can be economically rehabilitated and brought back really to modern day standards.

Q. And with respect to Ghent, what was your conclusion as to that?

A. Well, the conclusion in Ghent was that it was possible. A program was developed to accomplish that, which really included two things.

One, the preparation of a set of standards for rehabilitation that were higher than the normal City minimum housing codes which were adopted in the plan. And also the construction of numerous public facilities needed within the project area, either because current facilities were out of date and needed

repair, or needed replacing.

Q. With respect to Ghent, can you itemize some of the public improvements that were installed?

A. Yes. Olney Road was totally rebuilt between a relocated Colley Avenue, and in the museum in the vicinity of Llewellyn Avenue, all of the streets, and in the neighborhood were resurfaced. New landscaping was installed where landscaping was missing on any of the streets. A number of parks were built, some along the

(TR-128)

south side of Olney Road. One at the corner of Manteo Street and new Colley Avenue.

Colley Avenue was relocated. The Hague was dredged. The old Hague bridge

was completely rebuilt and a completely new lighting system was installed throughout the entire project area.

Q. Do you have an recollection of the gross dollar expenditures involved in the Ghent project?

A. If I could refer to some notes here.

We made a total of approximately $4.8 million in rehabilitation loans to assist property owners in rehabilitating the property. Some of that involved grants. Some involved local loan funds that were developed through local banking institutions, and some involved federal 312 loans.

We estimate that the private investment that took place was well over $4.5 to $5 million as a result of some of

these other things that took place, and the public improvements were well over $4 million.

Q. Now, the funding scheme for that involved local and federal money?

A. Yes, sir. This was approved under the urban renewal program in which the federal government agreed to pay 2/3 of the cost and the City basically agreed to pay 1/3 of the cost.

(TR-129)

Q. Was the 1/3 that the City paid all in cash, or how was that handled?

A. Virtually all of it was handled through the installation of public improvements, although I would have to relate that to other projects to explain it properly. All of the projects that the City and Housing Authority were involved

in were all pooled together in terms of amount of federal money involved and local money involved.

If the City -- the City was capable of putting up 1/3 share through the construction of certain public facilities like streets, schools, parks and so on. And in the total scheme of things, the City's investment in public facilities far exceeded 1/3 share. So by the time we got to this project, we were virtually using federal money to build the public improvements that took place.

Q. And the federal money came directly to Housing Authority, not to the City?

A. Yes, sir, at this time.

Q. Now, with respect then to the adoption of the plan, and so forth, was

that -- did the City have any involvement in the plan itself?

A. Yes, sir. The development of the plan involved both people in the City and various City departments, and it involved the neighborhood itself, very

(TR-130)

strongly. And in the end when the plan was actually adopted, it was adopted by our Commissioners and by the City Council of Norfolk.

Q. And were the public hearings held in connection with that?

A. Yes, sir.

Q. Now, with respect to the East Ghent North, and East Ghent South, they are redevelopment projects. Would you -- was the general scheme of adoption or formulation of the plan approximately the

same?

A. I would say the general scheme is the same. Basically the conclusion of the studies we did in there was that the properties could not be rehabilitiated and the only alternative that exited for trying to correct the situation, because of the condition of the buildings, and to a great extent also the condition of facilities in the area, such as old schools, worn out utilities and so on, that the area had to be totally acquired and cleared and rebuilt.

Q. Okay. Now, in the Ghent Conservation Project, the acquisition would be only on a selected basis, as opposed to a general acquisition in East Ghent North and South projects?

A. That's generally true for the

project. There was a part of Ghent Conservation Project basically

(TR-131)

west of relocated Colley Avenue that was totally acquired.

The remaining part of the project, unless it was being acquired for the widening of a street or for a park, acquisitions only took place were property owners refused to rehabilitate the property.

Q. Now, turning your attention to the land that is south of Olney Road, extending from Colonial Avenue eastwardly, the property right at the corner and then the property between Colonial and Botetourt, was that acquired by the Authority?

A. Yes, sir.

Q. And for what purpose?

A. For public park purposes, which also accommodated the street widening on the south side.

Q. Now, across the street to the north would be -- strike that.

Were the properties directly across on the north side of Olney Road acquired?

A. Yes.

Q. And coming back to the Hague and Stockley Gardens, was the property on the north side of Olney Road acquired there?

A. (No response).

Q. Now, that would start with the block where Christ and St. Luke's Church is and extends easterly along

(TR-132)

there?

A. The corner property at Colonial was acquired, but nothing else, to the best of my knowledge.

Q. All right. And on the south side, was that property acquired?

A. Yes, sir. All of that.

Q. And was that also for a park?

A. Yes, sir. And the widening.

Q. Then going back to the redevelopment plans and the East Ghent North and East Ghent South, were those plans developed in conjunction with the same City departments and same City officials that you mentioned before?

A. Yes, sir.

Q. Did that involve the planning commission as well as the public utilities and public works departments?

A. And in the school system, and the

Department of Parks and Recreation. I have to add to that list when you get into the actual development of the total plan.

Q. Then how does the -- there would be certain local obligations with respect to the project. You mentioned they had to pay 1/3 share, or provide for it. Was there any document or agreement between the City and the Authority respecting those obligations?

A. Yes, sir. There was always a cooperation

(TR-133)

agreement prepared for every redevelopment or conservation project which basically set forth how the 1/3 share of the City would be met.

Q. And that was in every project there would be a disagreement between the

City and the Authority with respect to those things?

A. Yes.

THE COURT: I don't know if it makes any difference, but so I can keep it straight, do I understand that the City doesn't necessarily put up cash, it gets a credit for whatever work is done for streets and schools?

THE WITNESS: That's exactly what is was.

BY MR. CRENSHAW:

Q. With respect to the East Ghent North and South project, that was a clearance project, I understood you to say?

A. Yes.

Q. And in that, was the new street pattern laid out in that area?

A. Yes. That area really basically within the boundary shown on the map was completely, 99 percent acquired and cleared. As some of the other testimony mentioned, there were areas in it that flooded. Areas that had to be raised. Completely new utility systems. Sewer, water, so on, were installed. And new utilities,

(TR-134)

private utilities installed, based on the overall plan for the whole neighborhood.

Q. Now, with respect to that, do you see Llewellyn Avenue was in pretty much the same location but it was bowed. Do you know why that was changed, that location?

A. Yes, sir. It was moved to try and increase, or to increase the size of

the Maury High School site which originally was between the street that is shown there and DeBree, and was about as small as three acres at one time, and that was part of a program to bring that up to a reasonable standard for an in-city high school. It still does not meet new standards for new construction as far as the state is concerned, but it got it close to 20 acres.

Q. How did you determine, or how was it determined that a new street pattern, or where the new streets would go. How did they come about?

A. Well, beyond some of the through streets, and by through streets I mean things really serving more than just the project area like Olney Road and Llewellyn Avenue and Princess Anne Road. Decisions

in connection with those were closely worked out with the City's Department of Public Works, as to size, width, traffic movements and so on.

(TR-135)

Within that framework of streets, most of the, although all the street plans had to be approved by the various City departments, how those things were arranged were really a function of what we were going to try to get built within the project area.

Q. You speak of, we were going to get built. Does that mean the Authority contracted for and handled the construction of the streets?

A. Yes, sir.

Q. Do you know why it was that the Authority did it, as opposed to the City

building the streets?

A. Well, it was part of the credit system that I just mentioned where the said cities, the amount of money that the city had in credits exceeded what their 1/3 share was, so in this particular project and in a number of others we actually contracted for the work, for the design of them and construction, rather than having the City do it as a credit toward the project which they didn't need to do. So this was actually the use of direct federal money to build the streets.

Q. By doing that you didn't have to use local city funds to do it?

A. That's right.

Q. Was this a result of the credit that resulted from construction of Scope?

A. Yes, that was a large part of it.

Q. Now, going back to the impact, can you give us some kind of quantifiable statistics or facts of the impact of these projects, say East Ghent North and South projects of this construction on the City?

A. Yes. If I could use some of these notes. There were approximately 1,330 families and individuals in the East Ghent North and South project.

As part of the project, we demolished 710 structures. That included about, 1,600 dwelling units. Relocated 79 businesses, relocated a total of 1,232 families, all of which had to be relocated into decent, safe and sanitary housing. And we installed over $10 million worth of public improvements in the streets and utilities and parks and all the other

things that we talked about, within the two, within the project area.

Before redevelopment, taxes to the City for just the Ghent Square area of the project, which is the area west of Llewellyn, between Colonial and Olney and 20th Street in the north, the tax was about $97,000, adjusted for today's rate. Current taxes, with only about 30 percent of that area built out, are about 150 percent of that, or $243,000.

And the projected build out would be about $800,000 or 720 percent increase.

(TR-137)

So we have moved the -- we have done away with the conditions that existed. Families have been relocated into good sound housing, and as far as the new development is concerned, there is a

tremendous return to the City.

Q. You mentioned the conditions that existed, and phrase, decent, safe and sanitary housing. Was that the kind of housing that existed before the project? What kind of housing was that before the project?

A. Yes, sir. It was largely frame construction, very much deteriorated. Old, not being taken care of. And in our opinion could not have been rehabilitated.

Q. And that would be true for the entire section North and South, East Ghent North and South?

A. As a total, yes.

Q. Now, with respect to the Rosemont project, this was a redevelopment project. Were the approval procedures the same as it would be for East Ghent North and

South?

A. Yes, sir.

Q. Now, this map, or this Exhibit No. 4, goes only as far as Johnstons Road. Actually was there some more of project above that?

A. Yes. It continued up between Chesapeake Boulevard and Military Highway, almost to Little Creek

(TR-138)

Road.

Q. That entire area was cleared?

A. Yes, sir.

Q. And then was it rebuilt in stages?

A. The first -- yes, the first area built was the area from Johnstons Road north.

Q. What kind of housing was in there

before this clearance program?

A. It was probably the worst housing of any project, as far as its physical arrangements, and so on. The platting in there was very poor. Ownership was unknown, in many cases. There were a number of trailers. There were a lot of units that had no plumbing, had no hot water and bathroom facilities, and so on.

Q. Now, since that time, how has it been developed?

A. It has been developed predominately in housing. Again, there have been provisions made for the expansion of one of the schools that was in the area, Rosemont Jr. High School, which was in the middle of that map. We reserved other sites for future schools, expansion, other than those things, and a very limited

amount of commercial, done predominately in new housing units, for a large mixture of families at different incomes, ranging from public housing all the way up to

(TR-139)

conventionally financed townhouses and single family homes.

Q. Do you have any figures available on the tax impact before and after in that project?

A. Yes. There have been about a little over two thousand units constructed in the project area, with only about 750 of them there before the project was ever started. It was a fairly low density situation. The taxes before redevelopment were $52,000, and after redevelopment this year, $758,000, or 1,400 percent increase. The total project cost $8.7 million. And

we went through the same, you know, relocation process that I just described in the other projects. Now then, just briefly into the Berkley project.

Q. That is redevelopment and --

A. Yes, sir. And some conservation.

Q. With respect to Exhibit 5, we show in red and green the new C & P Telephone Company plant, where the areas to the left of those two -- those pieces of zipaton, whatever they are called, that red and green, was that area cleared?

A. Yes, I think with the exception of one church, existing church.

Q. Do you know -- strike that.

Has there been any redevelopment in the

(TR-140)

project area?

A. Yes.

Q. What is that?

A. In that area, one section, a low income housing project has been built along Liberty Street on the left-hand side of the area you are talking about.

Q. Okay.

A. That's just on the area you were just talking about.

Q. Yes, here. Anything built up in here?

A. Well, part of that area, or the majority of it, part of it is existing church, which is going to expand, and the other part is going to go into a park, and there is the Southside Boys Club has a facility under construction on that site right now.

Q. And the Southside Boys Club would

be south of Culpepper, and west of Berkley?

A. Yes, sir.

Q. In the vicinity of Craig Street and Mahone Avenue?

A. Yes.

Q. Okay. Now, Mr. Rice, did you personally -- were you personally involved in the negotiations with the telephone company or VEPCO in the negotiations concerning the relocation of their facilities, where they would go in

(TR-142)

the new site, and that sort of thing?

A. I am sure from time to time I was in meetings with representatives of both companies. I was much more involved in the development planning for the projects than I was in details of working out where everyone had to go in order to make them

work, which was handled primarily by engineers.

Q. And that would include Mr. Kunkler?

A. Yes, sir.

Q. With respect to planning aspects of it, was the City constantly involved or advised with respect to that?

A. Yes.

Q. Would their representatives be in attendance from time to time at these meetings?

A. Yes.

****

CROSS-EXAMINATION

BY MR. GREER:

Q. Mr. Rice, in the planning then that you were involved in, do I take it from your answer you didn't get down to

the details of where certain things were to go, or not? Is that what you meant, or did you?

(TR-142)

A. That's what I meant.

Q. But insofar as the total concept of what was to be done with the land, how it was to be used, you were involved in that?

A. Yes, sir.

Q. And in regard to that, where the streets were changed and taking Ghent -- well, let's take the other one. On the closure of the streets such as Duncan and Duke and Llewellyn, and then the new work that was put in, in regard to those, when the new work was done, with the Authority having acquired the land, was that a right of entry that was given to the telephone

company to put those in until they were rededicated for streets?

A. Well, in some cases that might have been done. I am sure the record could be produced to show that where the facilities had to be put in in order to retain service, and so on, and the basic new street plan had been agreed to by all those involved in the City, and so on, and C & P was ready to move on their installations, we may have given them the right of entry. I don't remember them one by one.

Q. That would be because you then owned the land, and for them to do it --

A. And had not yet been dedicated?

Q. Are you familiar with their right of entry

(TR-143)

letter? I referred to it earlier -- I

don't know if you were in the court -- which is a March 22, 1973 letter from Jack Shiver who was then the executive director, or if not the specific letter, you are familiar with that procedure?

A. Yes, I am familiar with the procedure.

Q. All right.

A. I can't say as I remember this specific letter. I was probably involved in it.

Q. But with that outline, what I am getting at, that is the procedure followed by giving this, "right of entry" until the rededication of the street. That would be what was followed?

A. Yes.

Q. All right.

MR. GREER: I would like to have

that marked then, 28 A, 14. Letter of March 22, 1973 to C & P from Norfolk Redevelopment Authority.

BY MR. GREER:

Q. Mr. Rice, I take it from your testimony in relating the scope and some of the costs and investments, that these projects could not or would not have been undertaken without the federal money, with the approval of the Federal Urban Renewal Program, is that correct?

A. I would say they would be very difficult to do without federal assistance, if not impossible.

(TR-144)

Q. Mr. Rice, during the course of these proceedings, going through the administrative part and all and on into today, were you made aware through the

Redevelopment Authority and HUD, specifically the comparable claim that was made by C & P Telephone Company in West Virginia?

****

A. Yes, I was made aware of it. I can't tell you on what date or time.

BY MR. GREER:

Q. That was for relocation facilities, was it not?

A. Yes.

Q. And were you made aware of the disposition of that?

A. What do you mean by disposition?

Q. After the suit was brought against HUD and the West Virginia Redevelopment Authority?

****

(TR-145)

Do you know what happened, or anything about it?

THE WITNESS: I do know what happened.

BY MR. GREER:

Q. What?

A. I don't know, again, at what point in time. I think I found out at lunch today.

THE COURT: You found out this morning. Lunch today.

BY MR. GREER:

Q. What happened?

A. It was settled.

****

TESTIMONY OF ROBERT R. KUNKLER

DIRECT EXAMINATION

(TR-146)

BY MR. CRENSHAW:

Q. Mr. Kunkler, you have heard Mr. Greer question concerning a right-of-way or right of entry granted to the telephone company, and he has shown Mr. Rice, and has been introduced into evidence as Exhibit 20 A, a letter dated March 22 to the telephone company from Mr. Shiver.

Now, you take your time and look at that, and I would like to ask you if you are familiar with that and the circumstances that led up to that letter?

A. Yes, sir, I am basically familiar with the letter.

Q. How did that happen to be written, if you know?

A. You mean the need for the right of entry letter?

Q. Yes.

A. Excuse me. Primarily because I

think due to the timing of our projects, and the construction under way, the streets had not been rededicated. Normally there --

(TR-147)

sometimes there is a time lapse between closures of streets and rededication of new rights of way necessitating a legal vehicle for the utilities to reenter and do necessary construction.

Normally when streets are closed, the City reviews the plan of ongoing construction and construction that may be phased later, to answer my questions the City may have as to drainage problems, sewer and water problems, and how these will be utilmately fulfilled or satisfied.

Q. Okay. Now, this was a right to come in on a temporary space as expressed

in that letter?

A. That is correct.

Q. Earlier we talked about whether the C & P had an easement along Llewellyn Avenue and Olney Road. Did they have an easement for their facilities along those two streets, or either of them?

****

(TR-151)

BY MR. CRENSHAW:

Q. So they ended up with additional easement?

A. Yes, five foot easement. Now, going back a bit to the plans to relocate the lines, what agency met with you, or attended meetings that you attended concerning the proposed relocations?

A. You mean initially?

Q. Start from the beginning and

bring us up quickly.

A. Initially when the plan was formulated we met with all agencies from the City, Department of Public Works, Department of Utilities, and officially notified the utility departments like VEPCO and C & P that this was

(TR-152)

a preliminary plan that we had, and asked them to review the new road systems as planned, and to give us feedback as to what problems would be encountered. The review agencies normally in the City would be for the most part Public Works, and Department of Utilities to let them know, and to get their concurrence on what utilities would be relocated, what problems existed in the site as to drainage, sewage problems, and in this particular case on

Duke Street, there was a pump station, sanitary sewage pump station that had to be relocated. And it was items of this nature that were reviewed, coordinated with the City agencies.

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TESTIMONY OF GEORGE W. AUSTIN, JR.

DIRECT EXAMINATION

(TR-154)

BY MR. CRENSHAW:

Q. Mr. Austin, would you, for the Court, state your name and official position with the City of Norfolk?

A. George W. Austin, Jr. I am the chief highway engineer for the City of Norfolk. I have been with the Public Works Department approximately 26 years.

Q. And in that job, have you had anything to do with the relocation of the

streets or realignment of streets and redevelopment projects in the City of Norfolk and the problem of relocating utilities within those streets?

A. Yes, sir.

Q. And when a redevelopment plan is adopted and then later approved by the Council of the City of Norfolk, is the Public Works Department, on behalf of the City, involved in the construction and the redesign of the streets that would go back into those redevelopment project areas?

A. Yes, sir.

Q. In what way is it involved, sir?

(TR-155)

A. We review those documents as prepared, plans, to assure they are being done in accordance with our responsibility for representing the owner, the City of

Norfolk.

Q. That would be with respect to every street that is reconstructed in each of these plans?

A. Yes, sir. If it is the public's responsibility to maintain.

Q. Now, with respect to that, are you or your department shown the plans for the redesigned streets, and with respect to that, do these plans include the provisions for the relocation of the utilities?

A. Yes, sir.

Q. And before any work is done on that, is the approval of your department essential?

A. It is.

Q. And did the Authority actually act as liaison, or do the contacting people with respect to the streets we have

been talking about today?

A. Yes, sir.

Q. Now, with respect to the design of Olney Road, do you know why it was desired to widen and improve Olney Road?

A. It is part of the redevelopment of the area and the new land use, and also the transportation needs in

(TR-156)

that area.

Q. And can you mention any of the generators for the transportation that you expected to have to supply in the future for that area?

A. It is a major east west corridor, arterial, and our adopted transportation plan and on the western end and we will have a major medical facility in Eastern Virginia.

Q. So that the construction and prospective construction of a medical center is something that your traffic pattern has to accommodate?

A. That is correct, sir.

Q. Would the widening of Olney Road be essential for that?

A. It would.

Q. Now then, in that connection, your review of plans would include those for the relocation of Colley Avenue as well as the widening of Olney Road?

A. Yes, sir.

Q. Do you, yourself, have any contact with any of the representatives for Chesapeake and Potomac Telephone Company with respect to relocation of their lines?

A. Yes, sir.

Q. And what contact was that?

A. We have contact with them in regard to part

(TR-157)

of the review process of these plans, from time to time, as well as having people represented with the highway department when they are dealing with projects that the highway department is carrying out for City of Norfolk, as well as those improvements that we are making totally with local funds, wherein we have the total responsibility.

Q. Now, from time to time, have you dealt with -- have you requested the telephone company to move its facilities for some activity of the City not connected with redevelopment projects?

A. Yes, sir, we have.

Q. Have they done it at your

request?

A. They have.

Q. Have they paid for it?

A. Yes, sir.

Q. Has the City ever paid for any part of it?

A. On a clear dedicated right-of-way, no sir.

****

(TR-160)

THE COURT:

Now, under the circumstances, since this is being tried without a jury, I think the easiest thing for me to do is announce all of those exhibits are acceptable and those that have some particular force that you want to argue about as being improper for some reason, you do it and then I will decide whether I ought to

look at them or not.

THE CLERK: You are accepting them all in now?

THE COURT: They are all in. You don't have to worry about it.

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Exhibit No. 1

AN ORDINANCE

GRANTING PERMISSION TO THE SOUTHERN BELL TELEPHONE AND TELEGRAPH COMPANY, ITS SUCCESSORS AND ASSIGNS, TO CONSTRUCT, ERECT, OPERATE AND MAINTAIN SUB-WAYS, POLES, WIRES, CABLES AND OTHER ELECTRICAL CONDUCTORS UPON, OVER AND ALONG THE PUBLIC WAYS OF THE CITY OF NORFOLK, VIRGINIA.

SECTION 1. Be it ordained by the Select and Common Council of the City of Norfolk, Virginia: That permission be, and hereby is, granted to the Southern Bell Telephone and Telegraph Company, its successors and assigns, to erect, operate

and maintain its lines, including the necessary poles, wires and fixtures, upon, along and over sub-ways, with the necessary manholes and other appurtenances, under the surface of such public ways for the purpose of transmitting communication by electricity, the use of such public ways to be under such regulation affecting the general supervision and maintenance of such public ways as may be prescribed by law and the ordinances of said City; provided, however, that within that section of the City as described in "An Ordinance extending the business section of the City in which conduits are to be placed", passed by the Common Council on February 8th, 1898, and by the Select Council on February 24th, 1898, no pole or overhead fixture shall be erected, except

poles and fixtures for local distribution; the use of such public ways to be subject to the general regulations relating thereto as may be prescribed by the laws of the State of Virginia and the ordinances of the City of Norfolk governing the manner of the use of such public ways as aforesaid.

SECTION 2. In consideration of the rights herein granted to the Southern Bell Telephone and Telegraph Company, its successors and assigns, said Company shall supply to the City of Norfolk, when demanded by the City Councils, free service for the fire alarm wires of the city, such wires to be placed upon the topmost arms or fixtures of all poles erected and space shall also be provided by said Company, free of cost to said City, within

all subways constructed under the provisions of this ordinance for such wires. The said Company shall also furnish, free of cost to said City, ten telephones to be placed as designated by the City Councils, and shall also pay to said City annually three (3) per centum of the gross earnings realized from local telephone exchange service within the corporate limits of the City of Norfolk; but this does not exempt the said Southern Bell Telephone and Telegraph Company, its successors and assigns, from any license or other tax or assessement that may be levied by the City of Norfolk; and as a guarantee of the faithful performance of the foregoing provisions the books and system of accounts, showing the gross income derived from such local exchange telephone business as

aforesaid, shall be subject, at the end of each fiscal year, to inspection and verification by the Auditor of the City of Norfolk; and it shall be the duty of the Auditor, upon the request of the Finance Committee, to so inspect, audit and report said accounts and verify such reports as may be made by the said Southern Bell Telephone and Telegraph Company, its successors and assigns.

SECTION 3. The Southern Bell Telephone and Telegraph Company, its successors and assigns, before proceeding with the work of erecting poles, or laying subways, or constructing any of the details connected with this franchise, shall file a written description thereof with the City Engineer at least one week before the beginning of said work so as to

give the said Engineer time to examine into the matter, and shall protect and not interfere in any way with the existing gas, water, sewer or other pipes in the streets and avenues of said city, and shall, upon notification from the said Engineer, make good to the satisfaction of the owners of any pipes which may be damaged by it, any damage to said pipes done by it or its workmen, and should the said Southern Bell Telephone and Telegraph Company, its successors and assigns, refuse at any time to obey the directions of the said City Engineer in the premises and fail to make good any damage whatever to gas, water, sewer or other pipes, or to relay the pavements of said city to the satisfaction of the City Engineer, then the Southern Bell Telephone and Telegraph

Company, its successors and assigns, shall be liable to a fine, payable to the City of Norfolk, of not exceeding $100.00 a day, for each and every day's delay in carrying out said order, after reasonable notification thereof, to be recovered by law; and should the Southern Bell Telephone and Telegraph Company, its successors and assigns, at the expiration of ten days from the termination of such reasonable notice still fail to carry out the directions of the City Engineer, then the said Engineer is hereby authorized and empowered to have said damage repaired at the expense and cost of the said Southern Bell Telephone and Telegraph Company, its successors and assigns; and should they fail to pay the expenses and cost of said work promptly upon the bills therefor

being presented, then the franchise herein granted to the Southern Bell Telephone and Telegraph Company, its successors or assigns, shall at once cease and determine, if so ordered by the City Councils; provided, however, that if the failure to carry out any directions from the City Engineer as provided in this section, shall be found to have been unavoidable, then the said fine herein provided for shall be remitted. The Southern Bell Telephone and Telegraph Company, its successors and assigns, shall within sixty days from the passage of this ordinance enter into a bond payable to the City of Norfolk in a penalty of ten thousand dollars, with security satisfactory to the Councils of said City, conditioned to indemnify said City against any damage or

lost that may result in any way from the prosecution of said company's work, whether to gas, water, sewer, or other pipes, buildings or individuals, or any other damage to property or persons, and for the proper restoration and repair of all streets and pavements in anyway disturbed by it; but the taking of such bond of ten thousand dollars by said City shall not be construed as limiting to this amount the liabilities of said Southern Bell Telephone and Telegraph Company, its successors or assigns, for any damage or loss that may result in any way from the prosecution of its work, as aforesaid; and the Southern Bell Telephone and Telegraph Company, its successors and assigns, shall, upon notification by the City Engineer that he intends to lay sewer or

water pipes, at once proceed to change the location of any subways constructed by it that may interfere with the progress of the work, or else protect the same at its own expense and without cost to the City.

SECTION 4. All work under the ordinance shall be under the supervision of the Board of Electrical Control and in compliance with the ordinances of the City of Norfolk.

SECTION 5. This ordinance is subject to the further condition that said Southern Bell Telephone and Telegraph Company, its successors and assigns, shall, within sixty days from the passage of this ordinance, and before the same shall take effect, make and enter into a bond in a penalty of fifty thousand dollars, with security satisfactory to the

Councils of the City of Norfolk, and payable to said city with condition to indemnify and save harmless the said city from any and all damage or damages for which the city may become liable to the Southern States Telephone Company, its successors or assigns, by reason of the passage of this ordinance, or any section hereof, in consequence of the same being in conflict with the ordinance entitled "An ordinance granting permission to W. R. Brown and J. A. Helvin, and associates, to erect, maintain and conduct under certain streets subways or conduits, pipes or continuous ducts of metal stone or other durable material, and to conduct within the same wires for certain electrical business, and to do a telephone business", adopted by the Common Council August 6th,

1895, and by the Select Council August 13th, 1895; provided, however, that the City of Norfolk shall notify the Southern Bell Telephone and Telegraph Company, its successors or assigns, of any suit or action which may be brought by the Southern States Telephone Company, its successors or assigns, against the said city for the causes aforesaid, and permit the said Southern Bell Telephone and Telegraph Company, its successors and assigns, to join with said City in the defence [sic] thereof.

SECTION 6. The privileges conferred by this ordinance are granted upon the condition that the local exchange telephone service to be furnished by the Southern Bell Telephone and Telegraph Company, its successors or assigns, shall

be equal in all respects to the service furnished by said Company in other cities in the State of Virginia of about the same population as the City of Norfolk; otherwise the rights herein granted shall cease and determine; provided, further, that the Southern Bell Telephone and Telegraph Company, its successors or assigns, shall not furnish service at rates below those from time to time charged by any other Telephone Company in the City of Norfolk for the same service.

SECTION 7. Nothing contained in this ordinance shall be construed as granting to the Southern Bell Telephone and Telegraph Company, its successors and assigns, and [sic] exclusive right or rights, or as preventing the granting of similar privileges to other individuals or

companies for like purposes on the public ways of the City of Norfolk.

SECTION 8. The Southern Bell Telephone and Telegraph Company, its successors and assigns, shall at all times be subject to the general ordinances of the city now in existence or which may be hereafter passed, relative to the manner of the use of public streets or other public places by telegraph or telephone companies.

SECTION 9. The right to amend, alter or repeal this ordinance is hereby reserved to the City of Norfolk at its pleasure and without making compensation for any damage that may result from such amendment, alteration or repeal.

SECTION 10. The Southern Bell Telephone and Telegraph Company is

authorized to use the conduits of any other company, upon such terms as may be mutually agreed upon between such companies, and nothing in an ordinance entitled "An Ordinance granting permission to The American Telephone and Telegraph Company of Virginia to construct, erect, operate and maintain sub-ways, poles, wires, cables and other electrical conductors on the public ways of the City of Norfolk, Va.", passed by the Common Council of the City of Norfolk, on the 7th day of April, 1897, and by the Select Council of said City on the 11th day of May, 1897, shall be construed as forbidding said American Telephone and Telegraph Company of Virginia, from entering into contracts with the Southern Bell Telephone and Telegraph Company for

the use of its conduits.

SECTION 11. This ordinance shall be in force from its passage.

Adopted by the Common Council April 15, 1898.

(Sd.) Jas. L. Winston,
President Common Council.

Adopted by the Select Council April 12th, 1898.

(Sd.) J. C. Carroll,
President Select Council.

A Copy-teste: (Sd.) H. S. Herman,
City Treasurer.

UNITED STATES DISTRICT COURT

Exhibit No. 17(a)

East Ghent South Redevelopment
Project, Va. A-1-1

Block	Parcel	Date of Settlement
18	1	5/17/72
	2	6/ 1/72
	5	5/18/72
	6	12/20/72
	7	1/ 4/71
	8	11/10/70
	9	11/ 5/71
	10	8/11/70
	11	11/ 5/71
	12	10/28/70
	13	11/24/70
	14	11/ 2/70
	15	5/ 4/72
19	25	10/15/71
	26	1/22/71
	27	11/30/70
	28	11/10/70
17	17	3/ 8/72
	18	1/ 4/71
	19	5/ 4/71
	20	5/31/72
	21	9/11/75
14	1	1/ 4/71
	20	9/ 3/71
	21	1/ 8/71
15	10	12/17/70
	11	7/10/72

East Ghent South Redevelopment
Project, Va. A-1-1 (continued)

Block	Parcel	Date of Settlement
	12	10/ 5/71
	13	5/16/72
	14	5/ 4/72
	15	11/10/70
	16	11/11/70
	17	8/30/71
	18	11/17/70
	19	11/24/70
	20	1/ 4/71
	21	1/10/72
	22	11/25/70
	23	5/ 4/72
	24	3/ 7/72
	25	7/27/71
	26	5/31/72
17	1	1/ 8/71
	2	1/12/72
	3	11/17/70
	4	3/18/71
	5	12/17/70
	6	11/24/70
	7	11/24/70
	8	1/ 8/71
	9	11/10/70
	10	10/27/70
	11	5/19/71
	12	6/ 2/71
	13	10/ 5/71
	14	12/17/70
	15	1/12/73
	16	1/12/73

East Ghent South Redevelopment
Project, Va. A-1-1 (continued)

Block	Parcel	Date of Settlement
	40	10/ 5/71
16	1A	5/22/75
	6	12/18/70
	7	9/15/70
15	1	5/23/72
	27	11/ 3/72
10	8	8/27/70
	9	4/29/71
11	1	9/ 1/72
	18	8/14/72
	19	5/11/72
	20	6/29/71
9	1	8/ 5/74
	1A	7/ 1/71
8	1	12/15/70
	11	11/10/70
	12	12/15/70
	13	2/ 9/71
	14	12/ 1/71
	6	12/ 1/70
	7	4/27/72
	8	5/27/71
	9	11/10/70
	10	12/30/71
11	2	1/ 5/71
	3	10/22/70
	4	1/ 4/71
	5	11/27/70
	6	1/ 4/71

East Ghent South Redevelopment
Project, Va. A-1-1 (continued)

Block	Parcel	Date of Settlement
	7	2/15/72
	8	11/ 2/70
	9	1/ 8/71
	10	11/15/71
7	12	7/ 6/72
	13	5/11/71
	14	12/24/70
	15	5/17/71
	16	1/10/72
	17	5/24/71
	18	6/11/71
	19	5/10/71
	20	7/30/71
12	2	2/ 9/71
	3	10/28/70
	4	5/ 2/72
	5	7/10/72
	6	6/25/71
	7	1/12/73
	8	1/12/73
	9	8/ 9/72
	10	6/ 2/71
	11A	6/ 6/72
	11B	4/19/71

UNITED STATES DISTRICT COURT

Exhibit No. 17(b)

East Ghent North Redevelopment Project, Va. A-1-2

Block	Parcel	Date of Settlement
6	1	7/ 6/70
7	9	12/17/69
	10	12/17/69
	11	2/ 6/70
4	1	10/11/71
3	8	8/14/70
	9	4/19/71
30	1	9/ 4/70
	25	9/ 8/70
31	5	9/ 1/70
	6	6/ 1/70
	7	3/ 8/71
24	5	3/26/70
	6	6/ 1/70
	7	5/20/70
	8	6/ 2/71
25	1	7/10/70
	14	8/14/70
	15	5/20/70
	16	6/30/70
	17	10/15/70
21	7	7/16/71
	8	8/ 8/70
	9	6/17/70
	10	12/30/70
19	1	8/14/70
	2	4/21/71
	11	8/16/71

East Ghent North Redevelopment
Project, Va. A-1-2 (continued)

Block	Parcel	Date of Settlement
1	9	5/11/71
	10	3/ 8/71

UNITED STATES DISTRICT COURT

Exhibit No. 17(c)

Rosemont Redevelopment Project,
Va. R-25

Block	Parcel	Date of Settlement
54	1	2/25/66
	2	11/28/66
	3	11/15/65
	4	9/29/65
	5	11/28/66
	6	3/ 4/66
	7	11/29/66
	8	12/23/65
	9	11/30/66
	10	10/11/66
	11	8/ 9/66
	12	8/31/65
	13	8/25/63
	14	7/16/65
	15	8/ 5/64
	16	11/21/66
	17	11/21/66
	18	8/13/65
	19	1/20/66
55	1	11/ 9/65
	2	11/ 8/65
	3	7/17/64
	4	11/29/66
	5	3/18/66
	6	9/23/66
	7	12/27/65
	8	3/ 1/66
	9	9/23/66
	10	9/10/65

Rosemont Redevelopment Project,
Va. R-25 (continued)

Block	Parcel	Date of Settlement
	11	8/ 7/67
	12	
	13-16	
	17	
	18	3/ 2/66
	19	
	20	
	21	
	22	
	23	
	24	11/28/66
	25	
	26	1/ 6/66
	27	2/25/66
	28	6/10/65
	29	1/31/66
	30	9/28/66
	31	4/21/65
	32	10/27/65
	33	11/30/66
	34	4/27/66
	35	4/27/66
	36	2/18/66
	37	6/27/66
56	1	2/ 3/65
	2	11/ 8/65
	3	1/19/67
	4	1/19/67
	5	6/16/66
	6	1/18/66
56	7	3/17/67

Rosemont Redevelopment Project,
R-25 (continued)

Block	Parcel	Date of Settlement
	8	10/11/66
	9	8/ 5/66
	10	4/11/66
	11	6/27/66
	12	11/19/65
	13	8/ 8/66
	14	1/20/66
	15	10/24/67
	16	3/29/66
	17	2/17/66
	18	2/17/66
	19	4/12/66
	20	8/31/65
	21	10/21/65
	22	12/27/65
	23	2/18/66
	24	4/19/66
	25	7/21/66
	26	12/13/65
	27	7/22/63
	28	9/ 8/64
	29	9/21/65
	30	6/18/65
	31	4/30/65
	32	5/13/65
	33	9/27/66
	34	9/27/66
	35	6/30/66
	36	5/ 5/66
	37	12/27/65

Rosemont Redevelopment Project,
R-25 (continued)

Block	Parcel	Date of Settlement
	38	9/27/66
	39	9/28/66
	40	6/ 3/64
	41	9/28/66
	42	9/28/66
	43	12/16/65
	44	9/27/66
	45	11/29/66
	46	7/31/63
	47	10/12/66
	48	6/ 6/67
50	1	2/ 3/65
	2	5/26/66
60	1	8/21/64
	2	6/23/66
	3	8/ 5/66
	4	
	5	3/11/66
	6	4/21/64
	7	3/ 9/65
	8	12/23/66
	9	5/20/68
	10	3/22/67
	11	11/ 7/66
	12	6/30/66
	13	5/20/65
	14	11/21/66
	15	4/22/64
60	16	3/22/67
	17	8/ 1/66

Rosemont Redevelopment Project,
R-25 (continued)

Block	Parcel	Date of Settlement
	18	9/15/66
	19	10/28/66
	20	12/21/65
	21	1/20/66
	22	11/ 2/67
59	1	7/22/63
	2	9/13/66
	3	7/30/65
	4	3/ 2/66
	5	4/22/66
	6	7/25/66
	7	11/18/66
	8	8/ 4/66
	9	
	10	
	11	
	12	1/ 9/68
	13	8/28/63
	14	6/30/66
	15	3/15/67
	16	7/22/66
	17	
	18	
	19	5/ 2/67
	20	6/16/66
	21	8/ 9/66
	22	8/ 9/66
	23	8/ 5/66
	24	10/11/66
	25	5/ 2/67
	26	10/20/66

Rosemont Redevelopment Project,
R-25 (continued)

Block	Parcel	Date of Settlement
58	1	6/30/66
	2	11/ 2/67
	3	1/ 9/68
	4	2/15/65
	5	10/ 3/67
	6	3/ 6/67
	7	3/ 7/67
	8	11/ 8/66
	9	11/23/66
	10	10/12/66
	11	7/28/65
	12	3/ 1/67
	13	8/18/66
	14	3/ 7/67
	15	4/15/66
	16	8/ 4/66
	17	3/ 6/67
	18	8/ 5/66
	19	12/27/66
	20	8/ 7/64
	21	9/ 2/66
	22	7/15/16
	23	7/15/66
	24	1/25/67
	25	6/26/67
	26	8/ 6/64
	27	1/18/66
58	28	8/25/65
	29	8/ 2/63
	30	5/26/66

Rosemont Redevelopment Project,
R-25 (continued)

Block	Parcel	Date of Settlement
57	1	
	2	
	3	4/15/68
52	1	11/ 9/65
	31	6/14/66
51	23	6/27/66
	24	12/27/65
48	1	7/22/64
	42	7/23/65
49	22	12/31/64
	23	5/11/65
45	1	11/27/63
	36	3/ 7/63
44	21	6/ 2/64
	22	3/16/65
42	1	7/31/63
43	23	3/18/65
	24	1/25/65
39	1	4/14/65
	2	6/ 8/64
	3	4/14/65
	4	5/15/64
	7	9/16/64
	9	1/31/66
	10	7/21/65
	11	10/26/64
	12	6/22/64
	13	11/24/64
	14	7/ 5/64
	15	11/24/64

Rosemont Redevelopment Project,
R-25 (continued)

Block	Parcel	Date of Settlement
	16	6/17/64
	17	7/21/64
	18	3/ 2/65
	19	11/24/64
	20	3/ 2/65
	21	6/22/64
43	2	5/ 5/64
	3	5/ 5/64
	4	12/27/65
	5	6/10/64
	6	5/12/64
	7	7/22/64
	8	4/30/64
	9	9/ 8/64
	10	6/ 1/64
	11	9/ 2/64
	12	4/29/64
	13	12/14/64
	14	3/ 5/65
	15	1/18/66
	16	6/10/64
	17	4/22/64
	18	7/21/65
	19	6/ 9/64
	20	6/ 2/64
	21	12/ 4/64
	22	6/ 2/64
	23	3/18/65

UNITED STATES DISTRICT COURT

Exhibit No. 20 (AA)

March 19, 1973

Mr. Arthur Freeman, III
Director, Public Utilities
City Hall
Norfolk, Virginia 23510

Reference: East Ghent Redevelopment
C & P Telephone Company
Project No. 6679
Relocate Plants Along Olney
Road and Botetourt Gardens

Dear Mr. Harrell:

Attached herewith is one print each of sheet 1 of 1 covering the Olney Road, C & P Telphone Company project and the Botetourt Gardens, C & P Telephone Company project.

We have attempted to coordinate this work with the various utilities and feel that this has been accomplished.

The Olney Road project will require a city drain to be abandoned and a catch basin to be relocated. The C & P Telephone Company wil pay to have this 12" line abandoned and a new 12" line installed complete with new catch basins to tie in as shown on the

26

attached drawing. This work, of course, will be accomplished in accordance with city requirements of specifications and inspection.

The Botetourt Gardens project has been coordinated with the East Ghent South Part I project of the Redevelopment Authority and must be accomplished in order to abandon the telephone duct work and cabling in Duke Street which pass through the middle of abandoned and future closed streets.

We will appreciate your review of the referenced drawings and any comments you would like to make.

We respectfully request your approval of the telephone duct work location so that the project may be started at the earliest possible time.

If there are any questions concerning the design, please call us direct and we will be happy to meet and discuss the projects with you. Your continued cooperation in the East Ghent area is appreciated.

Very truly yours,

McGAUGHY, MARSHALL &
MCMILLAN

Jack M. Hill, P.E.

JMH:jh

Enclosures

cc: Mr. Kenneth R. Pittman, C & P
Telephone Co.
Mr. David Rice, Norfolk Redevelopment
and Housing Auth.

UNITED STATES DISTRICT COURT

Exhibit No. 20 (AA) (17)

CITY OF NORFOLK

March 29, 1973

Mr. Jack M. Hill, P. E.
McGaughy, Marshall & McMillan
220 West Freemason Street
Norfolk, Virginia 23510

Reference: ast Ghent Redevelopment
C & P Telephone Company
Project No. 6679
Relocate Plants Along Olney
Road and Botetourt Gardens

Dear Mr. Hill:

The Division of Traffic Engineering, Department of Public Works, City of Norfolk offers no objections to the location of the telephone duct work along Olney Road and Botetourt Gardens as indicated on the plans submitted by you.

The Division of Surveys did bring to my attention that the duct line is on City of Norfolk property and not in the Public Right of Way between Mowbray Arch and Duke Street, therefore, the

C & P Telephone Company should request that an easement be granted in this area.

Very truly yours,

/s/D. R. Norris

D. R. Norris
Engineering Technician

DNR:jmr

cc: Central Files
Mr. Jordan
Mr. Norris

UNITED STATES DISTRICT COURT

Exhibit No. 21

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
RICHMOND AREA OFFICE
701 EAST FRANKLIN STREET
RICHMOND, VIRGINIA 23219

REGION III
Curtis Building
6th and Walnut Streets
Philadelphia, Pennsylvania 19106

IN REPLY REFER TO
3.4G

June 18, 1979

Mr. Joseph L. Kelly
Williams, Worrell, Kelly & Greer
1700 Virginia National Bank Building
Post Office Box 3416
Norfolk, VA 23514

Mr. Francis N. Crenshaw
Crenshaw, Ware & Johnson
1640 Virginia National Bank Building
One Commercial Place
Norfolk, VA 23510

Dear Mr. Kelly and Mr. Crenshaw:

The Area Office has reviewed the claim of the Chesapeake and Potomac Telephone Company (C&P) for expenses in moving property pursuant to the Uniform Relocation

Assistance and Real Property Acquisition Policies Act of 1970, 42 U.S.C. 4601 et seq. (URA). The claim arises from the relocation of utility lines pursuant to urban renewal projects in Norfolk, Virginia as follows:

DATE	AMOUNT	WORK PERIOD	NRHA PROJECTS
5-4-75	$ 44,451.52	March '72 - December '74	VA R-25 - Rosemont
5-9-75	86,371.10	April '72 - June '74	VA R-8 - Olney Road
11-19-75	130,995.18	July '72 - February '75	VA R-8 - Downtown North
4-8-77	20,411.13	February '72 - February '74	VA R-8 (Manhole Charlotte)
4-8-77	389,537.60	February '73 - July '76	VA R-8
8-17-77	14,565.00(est)	August '77	VA A-1 - Berkley (II)
	$686.422.53		

[2]
The discussions of this matter have continued among the parties for several years and have included numerous issues. Due to the size of the claim, both the Norfolk Redevelopment and Housing Authority (the Authority) and C & P have diligently defended their respective positions, and, of necessity, this Area Office has labored long in giving the matter its due consideration. It is assumed that our decision will not be the end of this matter; however, we have attempted to deal with all of the issues presented so that any future controversies arising from this claim may be resolved more expeditiously.

It should be stated here that, while C & P has advanced a number of arguments that are well taken, the claim must be denied. However, although we have not conducted an exhaustive engineering review of line items claimed, if C & P were entitled to payment for the relocations, it appears that the expenses have been properly incurred, accounted and presented.

C & P bases its claim primarily on URA Sections 4601 and 4622, which provide, in part:

Section 4622(a) Whenever the acquisition of real property for a program or project ... will result in the displacement of any person ... the head of such agency shall make a

payment to any displaced person ... for--

(1.) Actual reasonable expenses in moving himself, his family, business, farm operation, or other personal property;

(2.) Actual direct losses of tangible personal property as a result of moving or discontinuing a business or farm operation, but not to exceed an amount equal to the reasonable expense that would have been required to relocate such property...;

Section 4601

(5.) The term "person" means any individual, partnership, corporation or association;

(6.) The term "displaced person" means any person who ... moves from real property, or moves his personal property from real property, as a result of the acquisition of such real property, in whole or in part, or as a result of the written order of the acquiring agency to vacate real property, for a program or a project...;

(7.) The term "business" means any lawful activity,

excepting a farm operation, conducted primarily - ...

(B) For the sale of services to the public; ...

[3]
To answer the fundamental question of whether C & P is entitled to relocation benefits, therefore, it is necessary to analyze two basic issues:

(1) Did the property itself, without regard to other factors (such as ownership), fall within the ambit of the URA?, and

(2) Does the URA apply to the distribution facilities of a public service corporation?

The case involves few factual questions. In order to clarify the record and define the legal issues, however, it must be stated that the Area Office has found that the relocation of C & P property was caused by federally assisted Urban Renewal and Neighborhood Development projects.1

I. Did the utility property (lines, conduits, etc.) itself, without regard to other factors (such as ownership), fall within the ambit of the URA?

A. Was there an acquisition of real property?

Pursuant to certain redevelopment projects the Authority acquired title to land situated within the City of Norfolk as authorized by state and federal statutes. In order to be able to reconvey the land with clear title, it was necessary for the Authority to request the closing of certain streets within the project area.[2] The City, then, did close those streets. The Authority, at that time, clearly believed that C & P would not even request reimbursement for its relocation expenses[3] and did not budget any money for that purpose,[4] a fact which is not, of course, relevant in determining C & P's entitlement to URA benefits. C & P moved its lines, etc., and filed a claim in a timely manner.[5]

The Authority argues that it was not responsible for the street closing. In Virginia, as in most jurisdictions,[6] it is settled that the power to close streets rests only in the local governing body or the State. In the case of

Mumpower v. Housing Authority of the City of Bristol, 11 S.E. 2d 732 (1940), the City had attempted to delegate the power to close the street to the Bristol Redevelopment and Housing Authority. The Supreme Court of Virginia held:

> By the second sentence of paragraph 11 the city "agrees that without charge to the Authority, it will vacate and close any streets, roads, roadways,
> [4] alleys, sidewalks or other places (which the Authority finds are reasonably necessary in the development of the Project) located in the area of said project or adjacent thereto." (Italics supplied.)
>
> The court is unable to find any basis upon which the validity of

> this sentence may be founded. It clearly, if sustained, places beyond the control of the local legislative representatives of the people, the determination of matters directly and vitally effecting the public safety. The location of public ways is purely a legislative function.
>
> p. 743

However, the fact that the City must be the entity to actually close the street is not determinative. The decision to close was clearly made pursuant to the Urban Renewal Plan, and the City, under Title I of the Housing Act of 1949, 42 U.S.C. 1450, as amended, is required to approve that plan:

> Sec. 105. Contracts for loans or capital grants shall be made only with a duly

> authorized local public agency and shall require that (a) the urban renewal plan for the urban renewal area be approved by the governing body of the locality in which the project is situated, and that such approval include findings by the governing body that ... (iii) the urban renewal plan conforms to a general plan for the development of the locality as a whole ....

The Authority, therefore, cannot deny responsibility for the street closings. While it might be argued that the City could have chosen to not close a particular street, it is certainly not reasonable to even entertain the idea that the City would have jeopardized these projects and millions of dollars of federal assistance by refusing its obligation to close the streets. Additionally, the geography

of these projects is such that a political decision not to close a particular street would almost necessarily require the closing of another, which would raise the same relocation problems.

As an additional (and definitive) point, the URA specifically provides that moves necessitated by urban renewal projects will be deemed as made pursuant to a real property acquisition without the actual necessity of a taking:

Section 4637

> A person who moves or discontinues his business, or moves other personal property, or moves from his dwelling on or after January 2, 1971, as a direct result of any project or program which receives Federal financial assistance under Title I of the Housing Act of 1949, as amended, or as a result of carrying out a comprehensive city demonstration program under Title I of the Demonstration Cities

and Metropolitan Development Act of 1966 shall, for the purposes of this subchapter, be deemed to have been displaced as the result of the acquisition of real property. [Emphasis added.]

It is this acquisition of real property, of course, that creates the rights to reimbursement in Section 4622.

The underlying rights of the fee holder must also be considered. As noted earlier at footnote 2, the abutting landowners presumptively hold the fee to the middle of the street, and it is the condemnation of all of the abutting land that enables the Authority to have the street closed. Ascertaining the exact point in time at which the street closing takes place in relationship to the final acquisition of the abutting land by the Authority is the precise sort of question that § 4637 seeks to avoid.[7] Given that C & P was forced to relocate as a direct result of Title I activity, then,

it is appropriate to inquire into the nature of the property relocated.

B. Utility Lines -- Real or Personal Property?

The Authority makes the bare assertion that "the lines are real property, not personalty."[8] To prove or disprove this point, much discussion has centered around questions as how the lines are taxed and how they have been treated in other localities or projects. This inquiry has resulted in much digression and confusion. The question is, quite simply, governed by the law of fixtures,[9] which looks to the intent of the parties at the time the property is connected to the land. The case of Bangor-Hydro Electric Company v. Johnson, 226 A. 2d 371 (1967) cited by C & P is quite informative in this regard. There the court held:

> The test to determine whether personal property becomes part of real estate by

accession, composed from Maine case law may be expressed as follows: Except in cases of trespass * * * a chattel is not merged in the realty, unless (1) it is physically annexed, at least by juxtaposition, to the realty or some appurtenance thereof, (2) it is adapted to the use to which the land to which it is annexed is put, or the chattel and the real estate are united in the prosecution of a common enterprise, and (3) it was so annexed with the
[6] intention on the part of the person making the annexation to make it a permanent accession to the realty, * * * which intention is not the hidden secret intention of the party

> making the annexation, but the intention which the law deduces from such external facts as the structure and mode of attachment, the purpose and use for which the annexation has been made and the relation and use of the party making it. * * *
>
> Applying this test, we find nothing in this report sufficient to persuade a finder of fact that the reference utility poles become part of the real estate by accession. They remain tangible property and come within the purview of the [sales and use tax] "Act." (228 A.2d at p. 378).[10]

The situation of C & P's property is not

distinguishable from that of Bangor-Hydro. It is the position of this Area Office, therefore, that all of that C & P property removed from the public ways (which we understand to be all of the items claimed) must be regarded as personalty.

II. Does the URA apply to distribution facilities of a public service corporation?

Having established that the claim would be allowed for property other than utility lines, we must now set forth the reasons for which the claim must fail.

A. The nature and history of franchises.

In order that a public service company may serve a given area, the public must often permit the company to use public rights-of-way in a manner different from those permitted the public-at-large. As stated in 12 McQuillin, Municipal Corporations, 9, 10, § 34.03 (3rd Ed.):

> In American law, a franchise is defined as

> a special privilege conferred by the government on individuals or corporations and which does not belong to the citizens of a country generally by common right ...
>
> The term "franchise" includes the term "privileges" . . .
>
> When granted, a franchise becomes property in the legal sense of the word, by virtue of contractual rights, and is termed an incorporeal hereditament, though separate and distinct from the property necessary in its use and exercise.

[7] These unique benefits of franchises, however, are attended by the unique burden that the sovereign can, for bona fide public purposes, remove a utility's right to use the property without paying any compensation.

The common law recognized that certain public necessities would, on occasion,

require that the franchise rights granted would have to be altered or altogether revoked and held that the affected utility was the proper party to bear the expense.[11] It was reasoned that, as the public service corporations consumers were the beneficiaries of the special privileges attending the franchise, they must be the ones to pay for cost incurred when the public-at-large exercised paramount rights in the public way.[12] The expenses charged to the utility are, of course, then passed on to the consumers through the rate structure (this result obtains even where the two groups are coterminous). Statutes, of course, can change this result, as can agreements between the parties. C & P maintains that the URA effected such a statutory change, while the Authority argues that it did not and that the agreement between C & P and the City controls.[13]

The Authority maintains that C & P is not entitled to relocation benefits because

it is not a "business" within the meaning of statute. To a casual observer it might seem that C & P does wear many trappings of a business (e.g., AT&T, the parent entity, is one of the largest corporations in the world); however, the distinction implied by the Authority is that C & P is a public service corporation (utility) as distinguished from all other types of businesses. As public service corporations are generally monopolies regulated by the sovereign and governed by a unique body of law, this distinction appears valid.

This separate treatment of utilities has been upheld in cases post dating the URA that do not raise the URA issue.[14]

In the Eugene case, the City had vacated certain alleys in 1974 and required Pacific Northwest Bell Telephone Company to remove its underground lines in order to facilitate urban redevelopment.[15] The court cited Highway Commission v. Clackmas W. District, 428

P.2d 395, (1967) for the common law position:

> -- the franchise granted to defendant is not a vested property right but merely a permissive use subject to revocation or change whenever the use of the right-of-way for the benefit of the public requires it.

[8] The court went on to cite other cases for the proposition that absent an agreement to the contrary or a special law, a utility was required to relocate facilities at its own expense. While there is little probity in the failure of others to raise the URA claim, the fact that utilities and courts continued to operate under the common law system considerably after a much publicized statutory development demonstrates, at a minimum, that the claim is not as obvious and automatic as C & P seems to indicate.

B. The purpose of the URA.

The distinction between businesses and the

franchised lines of utilities carries over from the common law to the URA. The Supreme Court of Delaware dealt extensively with the applicability of the URA to utility lines in determining that the URA had not preempted a prior statute that operated to bar the utility from recovering relocation expenses. The court stated that the URA does not "extend coverage to include utilities within its definition of displaced persons or businesses," Artesian Water Company v. State Department of Highways and Transportation, 330 A.2d 432, 438 (1974).

The House Report on S.1 clearly supports this position when it states:

> Such persons are presently defined as displaced persons, and eligible for relocation payments and assistance, in programs of the Department of Housing and Urban Development. This section, therefore, merely continues established policy with respect to

such persons.
(Emphasis added)[16]

The "persons ... presently defined as displaced persons" in HUD programs did not include the conduits, lines, etc., of utility companies. The HUD Urban Renewal Handbook, RHA 7209.1, chapter 2, p. 4 stated:

> Removal or relocation of utility lines owned by a private utility company will not be allowed as a project expenditure unless compensation to the company is required under applicable State statutes, judicial decisions, or preexisting local ordinances or provisions of the company's franchise. (Emphasis added).

[9] This approach mirrors the common law rule. It also leaves C & P in the same basic position as the Artesian Water Company. Thus, the court's comment there is instructive:

> The point to be made here is that the URA

> did not alter the prior scheme insofar as those "persons" who are entitled to benefits are concerned, but rather the procedure for and the extent of coverage to be had for those "persons" thereby qualifying under the Act. Artesian's contention that the URA expanded on the class of persons entitled to coverage to include all utilities is therefore an unwarranted interpretation of the Act. p. 438

> Contrary to C & P's contention that "the denial of the claims for the reason stated [by the Authority] can only be done by ignoring the specific language of the Acts and by giving an improper construction and interpretation to them,"[17] the claim could only be granted by ignoring case law and by giving the statute an entirely literal reading that Congress did not intend.

Based on the reasons set forth above, this Area Office determines that the claim of

28

the Chesapeake Potomac Telephone Company should be denied. The Company may seek judicial review of this determination pursuant to 24 CFR 42.250(c)(4).

Sincerely,

/s/I. Margaret White

I. Margaret White
Area Manager

Attachment - Footnotes

FOOTNOTES

[1]See discussion at I.A below.

[2]In Virginia, as in many jurisdictions, the abutting landowner owns the fee to the middle of the road, subject to the public easement of the right of passage, Western Union Tel. Co. v. Williams, 11 S.E. 106, 107 (1890). The public easement is, however, preeminent, and in order to exercise private rights over that property the land must be discharged of the servitude, whereupon the "absolute title and right of exclusive possession thereto reverts to the owner of the fee," Bond v. Green, 52 S.E. 2d 169, 173 (1949); Board of Supervisors of Louisa County v. Virginia Electric and Power Company, 192 S.E. 2d 768, 771 (1972). In a franchise situation the utility company has no rights to use the private property, as such, only the public way, so vacation of the streets serves a dual purpose.

[3]See Neighborhood Development program, Park Avenue, A-1, p. 22. It should be noted that VEPCO was paid for relocation of lines in this project; however, this was for undergrounding of above ground facilities pursuant to an opinion letter from the Authority's counsel to the effect that VEPCO would not otherwise be obligated to underground the lines. The ability to require undergrounding is not in issue here as we are dealing with lines already situated underground.

[4]In light of previous footnotes, it must be noted that the Urban Renewal Handbook 7209.1 would have precluded paying for C & P's relocation even had they requested, as it would not have been an eligible expense.

[5]The Authority had initially raised the issue of the timeliness of the C & P claim in the letter of October 25, 1976 from Francis Crenshaw to Mr. Harrison Bush, Esquire, of C & P. C & P's response to this in its September 28, 1978 letter to this Area Office from Joseph Kelly effectively rebutts this contention. The Authority has, in any event, conceded the point.

[6]See 10 McQuillin, Municipal Corporations 727, 39.40, 3rd Ed.

[7]A finding that there has been no acquisition of real property is not to be lightly taken. It must be recalled that it was the variations of the acquisition process that were, in a large degree, responsible for the URA. The House Report, in discussing the term "displaced person" notes:

> (3) The term "displaced person" means any person who, on or after the effective date of the act, moves from real property, or moves his personal property from real property as a result of the acquisition of such real property, or as the result of the written notice of the acquiring agency or any

other authorized person to vacate such property, for a program or project undertaken by a Federal agency, or by a State agency with Federal financial assistance. If a person moves as the result of such a notice to vacate, it makes no difference whether or not the real property actually is acquired . . .

[2] It is immaterial whether the real property is acquired before or after the effective date of the bill, or by Federal or State agency; or whether Federal funds contribute to the cost of the real property. The controlling point is that the real property must be acquired for a Federal or Federal financially assisted program or project. For example: . . .

It makes no difference to a person required to move because of the development of a postal facility which method the postal authorities use to obtain the facility, or who acquires the site or holds the fee title to the property. Since the end product is the same, a facility which serves the public and is regarded by the public as a public building, any person so required to move is a displaced person entitled to the benefits of this legislation.

1970 U.S. Code Congressional and Adminstrative News, 5853-4 (House Report No. 91 - 1656, 91st Congress, 2d session.)

[8]See letter from Francis Crenshaw to Harrison Bush, 10-25-76.

[9]C & P very effectively argues this point in their Memorandum #D-1203.

[10]The holdings of Virginia cases are to the same effect, e.g., Transcontinental Gas Pipe Line Corp. v. Prince William County, 172 S.E. 2d 757 (1970); Western Union Telegraph Company v. Williams, 11 S.E. 106 (1890); Talley v. Drumheller, 130 S.E. 385 (1925).

[11]See generally, 12 McQuillin, Municipal Corporations 183, § 34.74a (3rd Ed).

[12]See Id.; Artesian Water Company v. State Department of Highways and Transportation, 330 A.2d 432 (1974).

[13]The Franchise Ordinance of April 1898, Section 9, provides:

> The right to amend, alter or repeal this ordinance is hereby reserved to the City of Norfolk at its pleasure without making compensation for any damage that may result from such amendment, alteration or repeal.

This provision is certainly broad enough to include relocation of the utility line. If it were not, however, the construction in favor of the City would be adopted and/or the common law rule would prevail. See Urban Renewal Agency of the City of Eugene v. Pacific Northwest Bell Telephone Company, 542 P.2d 908, 912 (1975).

[14]Urban Renewal Agency of Eugene, 912; Union Electric Company v. Land Clearance for Redevelopment Authority of the City of St. Louis, 555 S.W. 2d 29 (1977).

[3]

[15]This was done for reasons similar to those in C & P's situation (see footnote 2).

[16]1970 U.S. Code Congressional and Administrative News, 5869 (House Report No. 91-1656, 91st Congress, 2d Session).

[17]Letter from Joseph Kelly to Area Manager, September 28, 1978, Exhibit A, P. 6.

UNITED STATES DISTRICT COURT

Exhibit 32

C & P TELEPHONE
1710 H. Street, N.W.
Washington, D.C. 20006
Phone (202) 637-9900

Legal Department

April 21, 1972

The Honorable Sam T. Barfield
Commissioner of the Revenue
City of Norfolk
City Hall
Norfolk, Virginia 23510

My dear Mr. Barfield:

This letter is submitted pursuant to the commitment I made at our meeting on April 18, 1972 and Section 58-1141 of the Code of Virginia.

As you are aware, the City of Norfolk has for some years classified most of our property as personal property and levied a tax on it at a rate higher than the real property rate. In 1966, the Virginia Legislature enacted Section 58-514.2 of the Code of Virginia which provides in essence that all of our property, except automobiles and trucks, is to be taxed at the real estate rate. This section further provides, however, that with

respect to property taxed at a higher personal property rate in 1966 the change to the real property rate could be accomplished gradually over a twenty-year period.

A 1970 decision of the Supreme Court of Appeals and a more recent Opinion of the Attorney General requires the immediate reclassification as real property of certain company property classified and taxed as personal property in 1966. In Transcontinental Gas Pipe Line Corp. v. Prince William County, 210 Va. 550 (1970), the Court held that the status of Transcontinental's gas mains must be determined by the law of fixtures and that they could only be properly classified as real property. The Attorney General has taken the position that property that is classifiable as real property under the tests set forth in this decision should be treated as having always been real estate for the purpose of applying Section 58-514.2 of the Code. Opinion of the Attorney General to The Honorable Charles A. Callahan, Commissioner of the Revenue, Report of the Attorney General (1970-1971) p. 375.

As we discussed at our Tuesday meeting, it is the Company's position that a proper application of the rule of the

Transcontinental case requires that the following Company property be reclassified as real property:

pole lines
conduit
wire lines
central office equipment

The provisions of Section 58-514.2 would of course continue to apply to the remainder of the property classified as personal property in 1966.

I would like to take this opportunity to thank you for the consideration and courtesy you showed us in finding time in your busy schedule to meet with us on Tuesday to discuss this important subject.

Very truly yours,

/s/J. W. Plaatje

J. W. Plaatje

UNITED STATES DISTRICT COURT

Exhibit 33

EASEMENT FOR UNDERGROUND UTILITIES

THIS DEED OF EASEMENT, made this 23rd day of April , 1980, between NORFOLK REDEVELOPMENT AND HOUSING AUTHORITY, a political subdivision of the Commonwealth of Virginia, hereinafter called the "Owner;" and VIRGINIA ELECTRIC AND POWER COMPANY, a Virginia corporation, hereinafter called "Grantee."

WITNESSETH THAT:

WHEREAS, the Owner will acquire, or already has acquired, upon closure and vacation of certain portions of Craig Street in the City of Norfolk, Virginia, legal title to portions of the streetbed

of the former Craig Street where said street abuts the Owner's real property; and

WHEREAS, it is necessary and appropriate for the Owner to convey to the Grantee certain underground utility easements to protect existing underground utility lines operated and maintained by the Grantee;

NOW THEREFORE, for and in consideration of the sum of One Dollar ($1.00) and other good and valuable consideration, receipt whereof is hereby acknowledged, the Owner hereby grants and conveys unto the Grantee, its successors and assigns, a nonexclusive easement and right-of-way to lay, construct, operate and maintain one or more lines for the transmission of electricity, as Grantee

may from time to time deem expedient or advisable, located in the rights-of-way hereinafter described, for electrical utility line purposes, together with such other underground equipment, accessories and appurtenances as the Grantee may from time to time require (hereinafter referred to as "facilities,") provided that all of the aforementioned facilities must be located underground, said easement and right-of-way to be upon, under, through and across certain property owned by the Owner and situated in the City of Norfolk, Virginia, described as follows:

> A permanent easement and right-of-way ten (10) feet in width in that portion of the former Craig Street closed and vacated by City Council of the City of Norfolk, said easement being in the former Craig Street, running from the southwestern street line of Berkley Avenue south-

westwardly to the northeastern street line of Mahone Avenue, and having as its centerline an imaginary line ten (10) feet northwest of the southeastern street line of the former Craig Street and parallel with said southeastern street line, said easement being shown on a plat entitled "Southside Boys' Club Subdivision," dated January 31, 1980, and recorded in the Clerk's Office of the Circuit Court of the City of Norfolk, Virginia, in Map Book 34 , at Page 131 .

The facilities constructed in the rights-of-way granted hereunder shall remain the property of the Grantee. The Grantee shall have the right to inspect, rebuild, remove, repair, improve, relocate within the rights-of-way described above, and make such changes, alterations, substitutions, additions to or extensions of its facilities so long as the facilities remain underground and within the

above-described rights-of-way, as Grantee may from time to time deem advisable.

Owner, its successors and assigns, reserves the right to use the land through which said easements and rights-of-way are granted for its own purposes, provided such use is not inconsistent with and does not interfere with the said easements and rights-of-way, and provided further that no building or permanent structure shall be constructed on, along or across said easements and rights-of-way. However, the Owner and its successors and assigns may install on the easements and rights-of-way fences, paving, sidewalks or benches.

The Grantee shall have the right to clear and keep cleared all trees, roots, brush and other natural obstructions from the surface and sub-surface of the

easements. The Grantee shall exercise its rights under this Deed of Easement in such manner as shall occasion the least inconvenience to Owner, its successors and assigns. The Grantee shall repair or pay for any damage to roads, sidewalks, fences or other property resulting from the construction, inspection, maintenance or operation of Grantee's facilities.

The Owner reserves the right to grant within the aforesaid easements and rights-of-way contiguous, coextensive or partially contiguous or coextensive easements for other public or non-public underground utilities, so long as the other contiguous or coextensive utility easements will not substantially interfere with the Grantee's use of the easements and rights-of-way granted herein.

This conveyance is made expressly subject to all conditions, restrictions and easements, if any, of record, constituting constructive notice.

IN WITNESS WHEREOF, Norfolk Redevelopment and Housing Authority has caused these presents to be executed in its name and on its behalf by Julian Rashkind, its Chairman, and its corporate seal to be hereunto affixed and attested by David H. Rice, its Secretary, as of the day and year first above written.

NORFOLK REDEVELOPMENT AND HOUSING AUTHORITY

By /s/Julian Rashkind
Chairman

Attest:

/s/David H. Rice
Secretary

STATE OF VIRGINIA

CITY OF NORFOLK, to-wit:

I, H. W. Martin, Jr., a Notary Public in and for the City aforesaid in the State of Virginia, whose commission expires on the 13th day of August, 1983, do hereby certify that Julian Rashkind, Chairman, and David H. Rice, Secretary, respectively, of Norfolk Redevelopment and Housing Authority, whose names are signed as such to the foregoing writing bearing date of the 23rd day of April , 1980, have acknowledged the same before me in my City and State.

Given under my hand this 23rd day of April , 1980.

/s/H. W. Martin, Jr.
Notary Public

UNITED STATES COURT OF APPEALS

Joint Appendix p. 151

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

PUBLIC SERVICE COMPANY OF OKALHOMA, an Oklahoma corporation,

Plaintiff,

vs.

PATRICIA ROBERTS HARRIS, Secretary of Housing and Urban Development, United States Department of Housing and Urban Development,

No. 79-C-37-BT

AND

BROCK ADAMS, Secretary of the Department of Transportation, United States Department of Transportation,

Defendants.

O R D E R

Plaintiff, Public Service Company of Oklahoma, brings this action seeking declaratory and injunctive relief based on the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, 42 U.S.C. §4601 et seq. ("URA"). In their answer, the defendant government agencies have moved to dismiss the complaint on a number of grounds. The legal issues have been briefed, and based upon the applicable law, the Court finds that this action should be dismissed.

In considering a motion to dismiss, the Court is to construe the complaint in the light most favorable to plaintiff, and the material allegations of the complaint must be taken as true. Jenkins v. McKeithen, 395 U.S. 411, 421-422; 89 S.Ct. 1843, 23 L.Ed.2d 404 (1969). The test for

determining the sufficiency of a complaint is that "a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Conley v. Gibson, 355 U.S. 41, 78 S.Ct. 99, 2 L.Ed.2 80 (1957).

The complaint alleges that plaintiff is a public utility under the laws of the State of Oklahoma; that plaintiff has been granted franchises in various cities and towns in the State which entitle it to use public streets, alleys and public places for the placement of its equipment; and that it has been required to relocate its facilities at its own expense because of various street construction or improvement projects funded in part by defendant

agencies.

It is plaintiff's position that federal agencies may not make grants or approve projects involving the use of federal funds unless the state first gives assurance that plaintiff's relocation costs will be reimbursed. In support of its position, plaintiff relies on the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, 42 U.S.C. §§4601 et seq. ("URA"), and alleges that the URA abrogates the common law rule that a public utility required to relocate must do so at its own expense.

Defendant's grounds for its motion to dismiss are (1) that there has been no acquisition of a property interest and, therefore, plaintiff is not a displaced person under the URA and not eligible for

relocation payments; (2) failure of Public Service Company to exhaust its administrative remedies; (3) defendant Secretary of Transportation is precluded from authorizing the expenditure of funds for this utility relocation by 23 U.S.C. §123 and 69 O.S. §1403(c); (4) plaintiff's claim as it relates to future occurrences is premature; and (5) plaintiff has failed to plead violations of the URA by defendants. Because of the disposition of this case on the first two grounds enumerated above, it is unnecessary to discuss the others.

WHO ARE DISPLACED PERSONS UNDER THE ACT?

The Uniform Relocation Assistance Act, 42 U.S.C. §§4601 et seq., /provides that before a federal agency may approve a grant for federal assistance it must have

received satisfactory assurances from the State that fair and reasonable relocation payments and assistance will be provided to "displaced persons." 42 U.S.C. §4630(1). A "displaced person" is defined in 42 U.S.C. §4601(6) as:

[2]

> "any person who, on or after January 2, 1971, moves from real property, or moves his personal property from real property, as a result of the acquisition of such real property, in whole or in part, or as the result of the written order of the acquiring agency to vacate real property, for a program or project undertaken by a Federal agency, or with Federal financial assistance; and solely for the purposes of sections 4622(a) and (b) and 4625 of this title, as a result of the acquisition of or as the result of the written order of the acquiring agency to vacate other real property, on

> which such person conducts a business or farm operation, for such program or project."

A corporation may be a displaced person by virtue of 42 U.S.C. §4601(5).

It is clear from the language of the URA that the URA applies only when there has been an acquisition of real property as a result of governmental action for a federal or federally aided project. Alexander v. HUD, _____ U.S. _____, 99 S.Ct. 1572 (1979); Moorer v. HUD, 561 F2d 175 (8th Cir. 1977). Therefore, in order for Public Service Company to prevail, it must show that its franchise is a property right and that there has been an acquisition. Neither is present here.

A franchise is a right or privilege conferred by law. It is a "right granted

by the state or a municipality to an existing corporation or individual to do certain things which a corporation or individual otherwise cannot do." Oklahoma Gas and Electric Co. v. Total Energy, Inc., 499 P2d 917 (Okl.1972). A franchise has also been defined as a "privilege of doing that which does not belong to the citizens of the country generally by common right." State ex rel Williamson v. Garrison, 348 P2d 859. A franchise therefore grants the franchisee the privilege of using public property for private purposes, but does not grant an interest in the land itself.

It is plaintiff's contention that a franchise, once exercised, becomes a vested property right in the particular location which has been utilizied.

However, plaintiff cites no applicable case in support of its contention. Empire Natural Gas Co. v. Southwest Pipe Line Co., 25 F2d 742 (N.D. Okl. 1928), cited by

plaintiff involved a contractual right to lay pipeline on leased property and not a

[3]

franchise. Parlane Sportswear Company, Inc. v. Weinberger, 381 F.Supp. 410 (D.Mass.1974) involved a tenant at suffrance who was forced to move from privately owned property. Plaintiff's attempt to apply that situation by analogy to a franchisee is unpersuasive.

On the other hand, there is ample support for the Court's determination that a franchise is not a property interest. The

Oklahoma Constitution, Article 18 §7 provides that a franchise grant shall not divest the State or its subdivisions of their control and regulation over the use and enjoyment of public property. Further, Title 69, O.S. §1403 specifically provides that whenever a utility company is required to relocate its facilities, such relocation is to be at the expense of the utility company. Thus, there is no property right involved. Further, there is no acquisition. Plaintiff has not been divested of its franchise, but has only been told that it must relocate certain of its facilities. Plaintiff still has the right to use public property, even though it must shift its equipment to accommodate the State's use of its property.

Plaintiff contends that the URA abro-

gates the common law rule that a utility required to relocate must do so at its own expense. That argument must fall because, first, in Oklahoma the rule is statutory, and secondly because the URA, by its own terms, does not create any new property interests. 42 U.S.C. §4602. Unless Public Service Company has a property interest under State law, which is lost because of the acquisition, it can claim no benefits under the URA. This is supported as well by the provisions of 23 U.S.C. §123, part of the Federal Aid Highway Act, which provides that federal funds may be used to pay the cost of utility reimbursement only when the cost is first paid by the State and only when the payment does not violate State law. Given the provisions of Title 69 O.S. §1403,

such a reimbursement would obviously violate Oklahoma law. Nothing in the URA either expressly or impliedly overrules Title 23 O.S. §123. Artesian Water Company v. State Department of Highways & Transportation, 330 A2d 432 (Del.1974).

EXHAUSTION OF ADMINISTRATIVE REMEDIES.

Defendants assert that the complaint should be dismissed because plaintiff has failed to exhaust its administrative remedies. Plaintiff on the other hand argues that an administrative appeal would be futile. The Court agrees with defendants. Title 42 U.S.C. §4633 of the Act authorizes heads of federal agencies to establish regulations and procedures to assure

> "(3) that any person aggrieved by a determination as to eligibility for a payment authorized by this chapter, or

> the amount of a payment, may have his application reviewed by the head of the Federal agency having authority over the applicable program or project, or in the case of a program or project receiving Federal financial assistance, by the head of the State agency."

Such regulations and procedures have been established, at least by HUD. 24 C.F.R. §§ 42.220-42.290. These regulations provide for review by the appropriate State agency or by HUD or both.

Under the URA, the land acquisition policy of 42 U.S.C. §4651 is not subject to judicial review by virtue of 42 U.S.C. §4602(a). Other administrative action is reviewable under the Administrative Procedures Act, 5 U.S.C. §§701 et seq. United States v. 249.12 Acres of Land, 414 F.Supp. 933 (W.D. Okl. 1976). The APA, 5 U.S.C. §704 provides:

"Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review. * * *"

Nowhere in the URA is there a statute making agency action reviewable. Therefore, before judicial review of an action may be had, administrative remedies must first be exhausted. When agency action is subject to appeal to higher administrative authority, that appeal must be pursued before judicial review is available. St. Regis Paper Co. v. Marshall, 591 F2d 612 (10th Cir. 1979); United States v. Carroll, 203 F.Supp. 423 (WD Ark.1962); United States v. 249.12 Acres of Land, supra.

While it is true that there may be

circumstances where exhaustion of administrative remedies is not required, none

[5]

of those circumstances has been shown to be present here. McKart v. United States, 395 U.S. 185 (1969); Martinez v. Richardson, 472 F2d 1121 (10th Cir. 1973); United States v. 249.12 Acres of Land, supra; St. Regis Paper Co. v. Marshall, supra.

For the foregoing reasons, the Court finds that this action should be dismissed for failure to state a claim upon which relief may be granted and for failure of plaintiff to exhaust its administrative remedies.

IT IS SO ORDERED.

DATED THIS 22nd day of August, 1980.

/s/Thomas R. Brett
THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE
NORTHERN DISTRICT OF OKLAHOMA

[6]

UNITED STATES COURT OF APPEALS

Joint Appendix P. 157

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF OKLAHOMA

LONE STAR GAS COMPANY, a division of Enserch Corporation, a Texas corporation,	)	
Plaintiff,	)	
-vs-	)	No. 80-100-C
MOON LANDRIEU, et al.,	)	
Defendants.	)	

O R D E R

This matter comes before this court on a motion to dismiss, or in the alternative, a motion for summary judgment, of the defendant, Moon Landrieu, Secretary of Housing and Urban Development.

Plaintiff, Lone Star Gas Company, has

filed suit herein seeking judgment against three defendants, Moon Landrieu, Secretary of Housing and Urban Development; Neil Goldschmidt, Secretary of the Department of Transportation, and Hugo Community Development Agency. Plaintiff has since dismissed Department of Transportation as a defendant. In its complaint plaintiff has demanded payment of relocation costs alleging failure to pay constitutes breach of contract, and plaintiff seeks to hold Housing and Urban Development liable for this amount and to hold Hugo Community Development Agency liable for this same amount plus attorneys fees.

Plaintiff holds a franchise to supply the City of Hugo, Oklahoma, with natural gas, which grants the company:

> the right, privilege and franchise to

> construct, maintain and operate in the present and future streets, alleys, parkways and public places in the City of Hugo, a system of gas mains, supply pipes and laterals, with all necessary or desirable appurtenances for the purpose of supplying natural gas to the said City, the inhabitants thereof, and persons and corporations beyond the city limits, for light, heat, power and other purposes; and that the right, privilege and franchise herein granted shall be and remain in Company, its successors and assigns, for a term of twenty-five (25) years from and after the date of the approval of this ordinance.

See Section 1 of Ordinance 510A of the City of Hugo, Oklahoma, adopted October 6, 1970.

The City of Hugo, Oklahoma, entered into a grant agreement with the Department of Housing and Urban Development whereby the City was to receive $719,000 to be spent in accordance with an approved program under Title I of the Housing and

Community Development Act of 1974. Some of these funds were to be spent on improvements to Fifth Street.

Fifth Street was being widened and paved. The street was already owned by the City. No land or easement was acquired by the City for this improvement. Before paving and widening Fifth Street, the City notified Lone Star that it must relocate its gas lines within Fifth Street already owned by the City.

On February 16, 1977, Peggy Kaley, Executive Director of Community Development, notified Lone Star to proceed with the relocation procedures. She stated that at that time it was her understanding that the costs of the relocating were the responsibility of the Community Development Agency.

On August 17, 1977, Peggy Kaley wrote Lone Star that the City was not responsible for the relocation costs, enclosing an opinion of the City Attorney, Bob Rabon, dated July 13, 1977, that both Public Service Company of Oklahoma and Lone Star Gas Company are legally responsible for the expense of relocating their lines on Fifth Street.

On August 24, 1977, Peggy Kaley wrote Billy Austin, Acting Director of HUD, Oklahoma City Area Office, to the attention of Dennis Youngblood, for an opinion whether utility relocation expenses could be paid out of CDBG funds.

Billy Austin replied to Peggy Kaley on August 31, 1977, that CDBG funds should not be used to pay the relocation costs since the City was apparently not under a

legal obligation to pay such expenses where utility lines were removed from a right-of-way.

On September 8, 1977, Peggy Kaley wrote W. D. Curtis of the plaintiff company concerning HUD's opinion expressed in Exhibit 6.

On September 30, 1977, Peggy Kaley wrote W. D. Curtis of the plaintiff company that Hugo Community Development had no authority to settle the question of relocation costs payment.

On November 4, 1977, George A. Willis, Manager of the plaintiff company, wrote Community Development requesting payment of relocation costs in the amount of $9,243.39.

On December 7, 1977, Peggy Kaley wrote W. D. Curtis of the plaintiff company that

Hugo City Council had voted to disallow payment of utility relocation costs on the 5th Street paving project.

On February 3, 1978, Bruce Westmoreland, apparently on behalf of plaintiff company (note the face of this letter does not mention Lone Star Gas Company), wrote the Community Development Agency that the sum of $9,243.39 was still due and owing.

On March 1, 1978, Peggy Kaley wrote to Bruce Westmoreland of the plaintiff company that the matter of relocation costs payment had been referred to the Lone Star legal department and requested him to check with them concerning payment.

The defendant City of Hugo allegedly denied liability for relocation costs under the Uniform Relocation Assistance

and Real Property Acquisition Act of 1970, 42 U.S.C. Section 4601 et seq. (hereafter referred to as URA). Plaintiff therefore seeks to enjoin Housing and Urban Development from continuing further projects in Hugo until plaintiff's costs are paid plus any other relief deemed proper by the court.

As a result of the Fifth Street paving project, plaintiff alleges that it was required to remove its gas lines at its own expense from part of its "easement," resulting in relinquishment of its right to part of the "easement." This allegedly constituted a taking of property without due process of law and without just compensation. Defendant has requested the production of said easement pursuant to Rule 34 of the Federal Rules of Civil

Procedure, and plaintiff has furnished it no easement but has provided the franchise attached to defendant's motion.

Defendant asserts that the complaint should be dismissed for failure to state a claim for which relief can be granted in that the plaintiff (1) has not alleged sufficient facts to establish a violation by defendants of the URA, (2) has not alleged sufficient facts to establish that it is entitled to relocation benefits under the URA, and (3) has failed to exhaust its administrative remedies under the URA. The court agrees with the defendant. Because of the disposition of this case on the first two grounds above, it is unnecessary to determine exhaustion of administrative remedies.

In considering a motion to dismiss the

court is to construe the complaint in the light most favorable to plaintiff, and the material allegations of the complaint must be taken as true. Jenkins v. McKeithen, 395 U.S. 411, 421-422; 89 S.Ct. 1843, 23 L.Ed.2d 404 (1969). The test for determining the sufficiency of a complaint is that "a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Conley v. Gibson, 355 U.S. 41, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957).

As pointed out by the defendant, the recent Northern District of Oklahoma case, Public Service Co. of Okla. v. Harris, et al., (N.D.Okla., 79-C-37-BT), is most similar to this case. The court concludes

that the well reasoned and written order of Judge Brett in that case is dispositive of this case.

As stated by Judge Brett in the Public Service case, supra:

> The Uniform Relocation Assistance Act, 42 U.S.C. Secs. 4601 et seq., provides that before a federal agency may approve a grant for federal assistance it must have received satisfactory assurances from the State that fair and reasonable relocation payments and assistance will be provided to "displaced persons." 42 U.S.C. Sec. 4630(1). A "displaced person" is defined in 42 U.S.C. Sec. 4601(6) as:
>
> > any person who, on or after January 2, 1971, moves from real property, or moves his personal property from real property, as a result of the acquisition of such real property, in whole or in part, or as the result of the written order of the acquiring agency to vacate real property, for a program or project undertaken by a Federal agency, or with Federal financial assistance; and solely for the purposes of sections 4622(a) and (b) and 4625 of this title, as a

> result of the acquisition of or as the result of the written order of the acquiring agency to vacate other real property, on which such person conducts a business or farm operation, for such program or project.

A corporation may be a displaced person by virtue of 42 U.S.C. Sec. 4601(5).

It is clear from the language of the URA that the URA applies only when there has been an acquisition of real property as a result of governmental action fr [sic] a federal or federally aided project. Alexander v. HUD, ____ U.S. ____, 99 S.Ct. 1572 (1979); Moorer v. HUD, 561 F.2d 175 (8th Cir. 1977). Therefore, in order for plaintiff to prevail, it must show that its franchise is a property right and that there has been an acquisition. Neither is present here.

A franchise is a right or privilege conferred by law. It is a "right granted by the state or a municipality to an existing corporation or individual to do certain things which a corporation or individual otherwise cannot do." Oklahoma Gas and Electric Co. v. Total Energy, Inc., 499 P.2d 917 (Okl. 1972). A franchise has also been defined as a "privilege of doing that which does not belong to the citizens of the country generally by

common right." State ex rel Williamson v. Garrison, 348 P.2d 859. A franchise therefore grants the franchisee the privilege of using public property for private purposes, but does not grant an interest in the land itself.

There is ample support for the Court's determination that a franchise is not a property interest. The Oklahoma Constitution, Article 18 Sec. 7 provides that a franchise grant shall not divest the State or its subdivisions of their control and regulation over the use and enjoyment of public property. Further, Title 69, O.S. Sec. 1403 specifically provides that whenever a utility company is required to relocate its facilities, such relocation is to be at the expense of the utility company. Thus, there is no property right involved. Further, there is no acquisition. Plaintiff has not been divested of its franchise, but has only been told that it must relocate certain of its facilities. Plaintiff still has the right to use public property, even though it must shift its equipment to accomodate the sovereign's use of its property.

Plaintiff contends that the URA abrogates the common law rule that a utility required to relocate must do so at its own expense. That argument must fall because, first, in Oklahoma the rule is statutory, and secondly

> because the URA, by its own terms, does not create any new property interests. 42 U.S.C. Sec. 4602. Unless plaintiff has a property interest under State law, which is lost because of the acquisition, it can claim no benefits under the URA.

Accordingly, defendant's motion to dismiss for failure to state a claim for which relief can be granted is sustained, and the complaint is dismissed in all respects.

It is so ordered this 30th day of March, 1981.

/s/Frank H. Seay
Frank H. Seay
United States District Judge

Docket No. 81-2332

Office - Supreme Court, U.S.
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In the Supreme Court of the United States

October Term 1982

NORFOLK REDEVELOPMENT AND HOUSING AUTHORITY, a political subdivision of the Commonwealth of Virginia,
Petitioner,

v.

THE CHESAPEAKE AND POTOMAC TELEPHONE COMPANY OF VIRGINIA,
Respondent,

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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TABLE OF CONTENTS

	Page
THE PETITION FOR CERTIORARI MISTATES THE QUESTION PRESENTED	1
NO DECISION OF THIS CASE CAN BE OF IMPORTANT CONSEQUENCE TO URBAN RENEWAL PROGRAMS GENERALLY OR TO ANY ONE PROJECT	3
THE COURT OF APPEALS HAS NOT "CHANGED THE COMMON LAW," OR HELD THAT THE URA CHANGED THE COMMON LAW, OTHERWISE THAN AS EXPRESSLY PROVIDED IN THE ACT OF CONGRESS AND IN ACCORD WITH ITS MANIFEST PURPOSE	10
THE DECISION OF THE COURT OF APPEALS IMPOSES NO INEQUITABLE BURDEN AND AFFORDS NO "WINDFALL" OR OTHER INEQUITABLE BENEFIT	17
CONCLUSION	19
CERTIFICATE OF SERVICE	21

TABLE OF AUTHORITIES

Cases

	Page
New Orleans Gaslight Company v. Drainage Commission, 197 U.S. 453 (1905)	15
Potomac Electric Power Company v. Fugate, 211 Va. 745, 180 S.E.2d 657 (1971)	15

Statutes

District of Columbia Public Utilities Reimbursement Act of 1972 (P.L. 92-495, §§ 3-4)	13,14
23 U.S.C. § 123	13
42 U.S.C. § 4601, Subsections (5)-(7)	11
42 U.S.C. § 4621	18
42 U.S.C. § 4622	11

No. 81-2332

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THE PETITION FOR CERTIORARI MISTATES THE QUESTION PRESENTED

The Petition states (p. i) that the question is whether Respondent, a public service corporation,[1] is a "displaced person" under the URA and so entitled to

1. The Chesapeake & Potomac Telephone Company of Virginia is a wholly owned subsidiary of American Telephone and Telegraph Company.

relocation payments "for the cost of removing its distribution facilities from public rights of way in the execution of an urban renewal project. . . ." (Emphasis supplied.)

Respondent's lines were not moved from public rights of way. They were moved from land which NRHA had acquired for the project so as to own this land in fee simple absolute, free from the public right of way which had previously encumbered it, and so as to enable NRHA alone, and neither the City, the State nor any other governmental authority or private person, either to permit or to forbid any further use of the land by the public or for the delivery of any public service.

This case does not involve any exercise of the unquestioned authority of a State or city government to control the use of land devoted to public use as a

street or highway by requiring rearrangement or removal of utility lines in the street to improve its usefulness to the public. The city government here did not exercise any governmental power or any right reserved to it under the terms of C&P's franchise to require a relocation of C&P's telephone lines. It could not do so after NRHA's acquisition of outright ownership of the land for redevelopment had been completed by extinguishment of the public easement which had formerly entitled the public to use the land and the city to control the manner in which it should be used by the public or to deliver public services through utility lines.

NO DECISION OF THIS CASE CAN BE OF IMPORTANT CONSEQUENCE TO URBAN RENEWAL PROGRAMS GENERALLY OR TO ANY ONE PROJECT

The fact that HUD does not join in the Petition for Certiorari refutes

Petitioner's contention that the decision of the Court of Appeals will seriously affect urban renewal programs throughout the nation.

Petitioner's attempt to explain HUD's failure to join is transparent. C&P's action against HUD and NRHA is primarily a suit for declaratory judgment to determine the rights and duties of the parties in situations common to most urban renewal programs, in which all three parties are often involved. Such declaratory relief is first and foremost among the forms of relief sought by the Complaint, is obviously of more importance to each of the parties than the enforcement of C&P's claims in this one case, and must surely be a part of any final judgment entered consistently with the decision and opinion of the Court of Appeals. Although the expenditure of public funds required to pay C&P's

claims and similar claims in other cases, by either the Federal government or the municipality, is minuscule on the scale of governmental expenditures for urban redevelopment, it is certainly true that such a judgment will materially alter policies and practices which HUD now follows in administering all Federally supported urban renewal projects.

HUD and only HUD, among the parties to these proceedings, is in possession of the detailed and comprehensive information needed to arrive at an informed opinion as to the possible effect of this case on urban renewal programs everywhere. In the light of such knowledge HUD obviously does not concur in Petitioner's contention that this case is of such nationwide importance as to merit consideration by this Court.

Facts within common knowledge explain HUD's inability to support

Petitioner's position as to this. The cost of paying claims like those of C&P could not amount to more than an insignificant fraction of the total cost of a redevelopment project. In addition to such major items as the cost of purchasing or condemning all of the land and buildings within the entire urban area to be redeveloped, the cost of demolishing and removing from the land all of the existing buildings, and the cost of engineering studies and planning and design work necessary to redesign and prescribe the future development of a substantial portion of an old city, the total governmental expenditure always includes the cost of relocating all city water mains, city sewers and storm drains, city gas lines, municipally operated electric power and light systems, and all other municipally operated public utility systems as required by the redevelopment

plan. To the inevitably great sum of these expenses the payment of claims like those of C&P would add only the cost of moving any similar facilities which are owned and operated by public service corporations rather than by the municipality, and then only to the extent that such facilities are moved as a result of the acquisition of land for the project and not as a result of improvements to an existing street.

Nor is this case important for any departure from an established or generally accepted prior interpretation of the URA. Petitioner's assertion that a different interpretation has been placed on the URA by other Federal agencies, or by any governmental agency other than HUD and redevelopment authorities following its dictation, and that this interpretation has been accepted by other utility companies, is wholly

unsupported by anything shown in the proceedings below and if there alleged would have been disproved. Also it is refuted by the protracted deliberations by both NRHA and HUD which preceded any decision of this question by either of them in this case. Any such firmly established and universally accepted interpretation of the URA would have been instantly decisive of all of C&P's claims, but as the record below will clearly disclose the NRHA, which has never questioned C&P's claims on any other ground, made no decision on any of these claims for one year and three months after the first of them had been presented, and on the administrative appeal to HUD this single question was kept under consideration and undecided by HUD's Regional office for more than eight months.

Petitioner argues that the cost of paying such claims might be burdensome to financially troubled city governments. Whatever small fraction of the total cost of a redevelopment project might be represented by the payment of such claims the city's one-third share of it could not seriously affect its ability to undertake a redevelopment project.

Petitioner argues further that many cities may have embarked on projects for which the payment of such claims has not been budgeted. It is not reasonable to suppose that either local governments or HUD have based their financial planning to any important extent on an immovable conviction that the effect of the URA could not possibly be what a unanimous panel of the Court of Appeals has held it to be. Nor can Petitioner complain if Federal assistance in the payment of C&P's claims has been lost or made

doubtful by the fact that the projects involved "have proceeded to financial settlement." (Petition p. ii). This could hardly have occurred before the claims had been duly presented. Also it is hardly possible that any such settlement based on a mistaken view of the law by both HUD and NRHA is incapable of being corrected.

THE COURT OF APPEALS HAS NOT "CHANGED THE COMMON LAW," OR HELD THAT THE URA CHANGED THE COMMON LAW, OTHERWISE THAN AS EXPRESSLY PROVIDED IN THE ACT OF CONGRESS AND IN ACCORD WITH ITS MANIFEST PURPOSE

The decision of the Court of Appeals is based on statutory language providing in so many words that relocation payments shall be made to any person, specifically including any corporation, which, as the result of an acquisition of land by a government agency for a government project, moves or moves its personal property

from the land so acquired, or from any land on which such person conducts a lawful business activity if the move is made as the result of a governmental acquisition of other land for a government project. 42 U.S.C. §§ 4601, Subsections (5) through (7) and 4622. Under a statute which thus explicitly requires payment of relocation benefits to any owner of any personal property who has to move it because a government agency has acquired the land on which the owner of the personal property has previously been permitted to install and maintain it, the Court of Appeals refused to rewrite these totally unambiguous provisions of the Act and refused to give to the URA only the effect which it would have if § 4601(5) had said that the term "person" means any individual, partnership, corporation or association other than a public service corporation, or if

§ 4601(6) had said that the term "displaced person" means any person who moves his personal property from real property, as a result of the acquisition of such real property for a program or project undertaken by a Federal agency or with Federal financial assistance, unless such personal property is equipment of a public service corporation which has been permitted to install and maintain such equipment on such real estate when it was devoted to public use as a street. In refusing to read into the Act exceptions which it nowhere contains the Court of Appeals can hardly be said to have "departed from the accepted and usual course of judicial proceedings."

Petitioner's contention that the Congressional purpose was to accomplish something less than the statutory language requires is not supported by anything in the Act or in its legislative

history. Petitioner argues that if Congress had intended application of the URA to relocations of utility lines which have been built in public streets it would have specifically referred to displacements of such facilities, pointing to the fact that it did so in the District of Columbia Public Utilities Reimbursement Act of 1972. Had it not done so that Act would have been unintelligible. The DCPURA, like § 123 of the Federal-Aid Highway Act, 23 U.S.C. § 123, which this District of Columbia Act directly parallels so as to make like provision for interstate highway projects in the District of Columbia, is directed to the special burden which falls on utility companies and their customers when massive government financing makes possible large-scale renovation and rebuilding of public streets and highways

necessitating extensive rearrangements of utility lines in existing streets and highways, independently of any government land acquisition and whether or not the relocation is in any way related to any acquisition of land for the project. One of the two operative sections of this 1972 Act, § 4, authorizes reimbursement for every utility line relocation made necessary by "the construction or modification of a project on or a part of the National System of Interstate and Defense Highways". (P.L. 92-495 § 4.) The other, § 3, authorizes such payments "whenever, as the result of urban redevelopment any utility facilities are required to be relocated * * * in order to meet the requirements of or to conform to a redevelopment plan * * *". (Id., § 3). Every redevelopment plan includes, or assuredly may include, the upgrading and rebuilding of existing streets in such a manner as

to require relocation of utility lines as a result of the street improvement and not as a result of any acquisition of land for the project. The DCPURA necessarily dealt explicitly with such relocations, and affords no indication that the URA did not also authorize reimbursement for moving utility lines which had originally been built in public streets if the relocation resulted from acquisition of the land for a government project and not from a street improvement program.

The decision of the Court of Appeals by no means "reverses" the familiar common law rule established by the landmark case of New Orleans Gaslight Company v. Drainage Commission, 197 U.S. 453 (1905) and everywhere followed in cases like Potomac Electric Power Company v. Fugate, 211 Va. 745, 180 S.E.2d 657 (1971), cited by Petitioner. This rule upholds the governmental power of State

and local governments to control the use of land in public streets, parks and other public places by requiring relocation or removal of utility lines occupying such land, when the public interest so requires, without compensation to the owners of such lines. These and the many other decided cases confirming the existence of this broad governmental authority under the police power all involve relocations of utility lines occupying land which will continue to be devoted to use by the general public at and after the time of the relocation. Even if this governmental power is not strictly dependent upon continued existence of the public easement encumbering the land from which utility lines are displaced the decision of the Court of Appeals in no way denies the continued existence of this power and indeed can hardly be said to

change existing law as to the exercise of this power.

THE DECISION OF THE COURT OF APPEALS IMPOSES NO INEQUITABLE BURDEN AND AFFORDS NO "WINDFALL" OR OTHER INEQUITABLE BENEFIT

Before the URA when a utility company had to relocate its lines because the land had been acquired for redevelopment this part of the cost of redeveloping part of an old city had to be borne by the people who use the utility service and pay all costs incurred in providing it, notwithstanding the fact that most of them are not part of the community benefited by the redevelopment. This occurred only because of a highly dubious administrative policy of HUD and its predecessors, which fully recognized the expense of moving utility lines as part of the cost of the project, to be borne by Federal and city taxpayers, wherever

the utility system was municipally owned, but denied such recognition if the same facilities were owned and operated by a public service corporation. The URA as applied by the Court of Appeals relieves against this inequitable consequence to those who pay their utility bills to a utility company rather than to a municipal agency. As in the case of all other displaced persons subjected to moving expenses as a result of a governmental acquisition of land for a government project, the URA here accomplishes its stated purpose, which is declared to be

> * * * to establish a uniform policy for the fair and equitable treatment of persons displaced as a result of Federal and federally assisted programs in order that such persons shall not suffer disproportionate injuries as a result of programs designed for the benefit of the public as a whole. 42 U.S.C. § 4621.

Nor could there possibly be any "windfall" to C&P or any "double recovery"

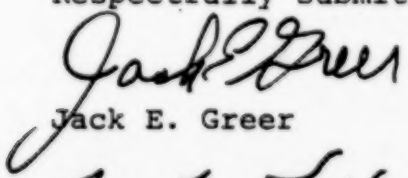
as the Petition asserts without the slightest actual or possible support. Under standard principles of accounting C&P's pending claims against NRHA are necessarily reported as accounts receivable and nowhere reported as expenses so as to be reflected in its rate base or in any charges which have been made to or paid by its customers.

CONCLUSION

The decision of the Court of Appeals firmly settles the single question of Federal law presented, excluding any future doubt about the effect of statutory language which leaves no room for speculation as to legislative intent. Neither the Petitioner nor the District Court which dismissed C&P's action and the two State courts which have accepted Petitioner's view of the statute has even attempted to show how any decision other

than the one reached by the Court of Appeals could possibly be reconciled with the clear and unequivocal language of Subsections (5) through (7) of 42 U.S.C. § 4601. Any governmental agency objecting to the broad scope of these provisions should address its objections to the Congress and not to the Supreme Court.

Respectfully submitted,



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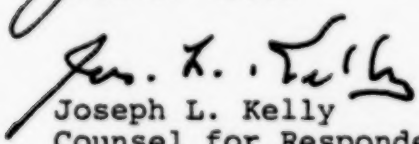

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CERTIFICATE OF SERVICE

I hereby certify that on this 20th day of July, 1982, three copies of the foregoing Brief in Opposition to Petition for Certiorari were mailed, postage prepaid to each of the following:

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No. 81-2332

In the Supreme Court of the United States

OCTOBER TERM, 1982

NORFOLK REDEVELOPMENT AND HOUSING AUTHORITY, ETC., PETITIONER

v.

CHESAPEAKE AND POTOMAC TELEPHONE COMPANY OF VIRGINIA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether respondent Chesapeake and Potomac Telephone Company of Virginia, a public utility created under the laws of Virginia, is a "displaced person" within the meaning of the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, 42 U.S.C. 4601 *et seq.*, when it seeks reimbursement for the cost of removing its telephone lines and related equipment from former public rights-of-way in the execution of an urban renewal project funded in part by grants from the Department of Housing and Urban Development.

PARTIES TO THE PROCEEDING

In addition to the parties named in the caption, the Secretary of Housing and Urban Development, a defendant-appellee below, is a respondent in this Court. However, as used in this brief, "respondent" refers to the C & P Telephone Company of Virginia.

TABLE OF CONTENTS

Page

Opinions below 1

Jurisdiction 1

Statute involved 1

Statement 3

Argument 5

Conclusion 8

TABLE OF AUTHORITIES

Cases:

Alexander v. *HUD*, 441 U.S. 39 6

Artesian Water Co. v. *Delaware Department of Highways & Transportation*, 330 A.2d 441, aff'g in part 330 A.2d 432 7

Consumers Power Co. v. *Costle*, 615 F.2d 1147 7

Mountain States Telephone & Telegraph Co. v. *Boise Redevelopment Agency*, No. 52891 (Idaho Dist. Ct. Oct. 27, 1980) 7

Pacific Telephone & Telegraph Co. v. *Redevelopment Agency*, 87 Cal. App. 3d 296, 151 Cal. Rptr. 68 7

Statutes:

District of Columbia Public Utilities Reimbursement Act of 1972, Pub. L. No. 92-495, 86 Stat. 812 6

Page

Statutes—Continued:

Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, 42 U.S.C. 4601 *et seq.* 1, 3

42 U.S.C. 4601 2
42 U.S.C. 4601(5) 3
42 U.S.C. 4621 ..... 2, 5
42 U.S.C. 4622(a) 2
42 U.S.C. 4622(a)(1) 3
42 U.S.C. 4637 3

23 U.S.C. 123(a) 6, 7

D.C. Code Ann. § 5-704 (1967) 6

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A-1 to A-14) is reported at 674 F.2d 298. The opinion of the district court (Pet. App. B-1 to B-12) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 25, 1982. The petition for a writ of certiorari was filed on June 22, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

The Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, 42 U.S.C. 4601 *et seq.*, provides in pertinent part:

Section 4601:

* * * * *

(5) The term "person" means any individual, partnership, corporation, or association.

(6) The term "displaced person" means any person who * * * moves his personal property from real property, as a result of the acquisition of such real property * * * or as the result of the written order of the acquiring agency to vacate such real property, for a program or project undertaken by a Federal agency, or with Federal financial assistance * * *.

(7) The term "business" means any lawful activity, excepting a farm operation, conducted primarily—

* * * * *

(B) for the sale of services to the public[.]

* * * * *

Section 4621:

The purpose of this subchapter is to establish a uniform policy for the fair and equitable treatment of persons displaced as a result of Federal and federally assisted programs in order that such persons shall not suffer disproportionate injuries as a result of programs designed for the benefit of the public as a whole.

Section 4622(a):

Whenever the acquisition of real property for a program or project * * * will result in the displacement of any person * * * the head of such agency shall make a payment to any displaced person * * * for—

> (1) actual reasonable expenses in moving himself, his family, business * * * or other personal property[.]
>
> * * * * *

Section 4637:

> A person who moves or discontinues his business, or moves other personal property * * * as a direct result of any project or program * * * shall * * * be deemed to have been displaced as the result of the acquisition of real property.

STATEMENT

Respondent C & P Telephone Company of Virginia brought suit in the United States District Court for the Eastern District of Virginia against the Secretary of Housing and Urban Development and petitioner Norfolk Redevelopment and Housing Authority seeking reimbursement for the relocation of its telephone lines, cables, conduits, poles, and related equipment, which was necessitated by four federally-aided redevelopment projects in Norfolk, Virginia. The basis for respondent's claim was the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, 42 U.S.C. 4601 *et seq.*, which provides that "[w]henever the acquisition of real property for a [federally assisted] project * * * will result in the displacement of any [individual or corporation]," the state agency shall pay for the "actual reasonable expenses in moving [the individual's or the corporation's] personal property * * *." 42 U.S.C. 4622(a)(1) and 4601(5).

The district court denied relief, holding that public utilities were not included within the reimbursement provisions of the Act (Pet. App. B-1 to B-12). The court based its conclusion on the common law rule that utilities are not entitled to reimbursement when they are directed by public authorities to remove their property from public ways on

which they have been given revocable easements. The court could find nothing in the Act or its legislative history indicating that Congress intended to abrogate this "well known common law princip[le] * * *" (*id.* at B-8 to B-9). In addition, the court pointed out (*id.* at B-10) that public utilities are distinguishable from other businesses because utilities "retrieve their operating costs and the reasonable return on their investment from the general public in their franchise area through rates that are structured to accommodate costs and expenses."

The court of appeals reversed and remanded for further proceedings (Pet. App. A-1 to A-14). First, the court rejected the common law argument, noting that "[t]he Act was intended to create rights that were not recognized at common law" (*id.* at A-5 to A-6). Furthermore, the court pointed out that "Congress' failure to mention utilities during the debates on the Act and in the legislative history * * * provides little reason to exclude utilities from the Act's coverage," because "the Act was intended to extend benefits uniformly to persons who are displaced by federal acquisitions of real property for federal programs. Exclusion of utilities from the Act's coverage would run counter to that purpose" (*id.* at A-6 to A-7). The court found that the literal language of the Act would apply "[i]n the absence of any clear legislative intent to exclude utilities * * *" (*id.* at A-7).

Although the removal technically was required by the city's closure of the streets (in furtherance of the project), the court of appeals rejected petitioner's factual argument that the removal of telephone lines by respondent was not the result of petitioner's acquisition of real estate (Pet. App. A-8).

Finally, the court of appeals held that the telephone lines and equipment were reimbursable personal property rather than nonreimbursable real property: "C&P, in placing its

lines, could hardly have intended them to become so annexed to real estate belonging to others that the lines themselves became the real property of those other owners" (Pet. App. A-11). "Indeed, everyone recognized C&P's right of removal of property which could only have been its personalty" (*id.* at A-12). The court noted that "[i]n similar situations in which a utility's facilities were installed or attached to real estate belonging to others, state courts have found that the facilities remained personal property" (*ibid.*). The court of appeals remanded the case to the district court for a determination of damages.[1]

ARGUMENT

The decision of the court of appeals is a reasonable construction of the Uniform Relocation Act and does not conflict with the decision of any federal court of appeals or any state supreme court. Accordingly, review by this Court is not warranted.

1. Although the Secretary of HUD defended the judgment of the district court before the court of appeals, we believe that the court of appeals' interpretation of the Act is a reasonable one. The language of the Act certainly is broad enough to include utilities forced to relocate their equipment, and in the absence of compelling legislative history indicating an intent to exclude from the Act one form of business, the language should control. The primary purpose

---

[1]Certain of the removal expenses were incurred with respect to lines in streets that were to be widened, and others in streets that were to be only partially closed. The court of appeals directed the district court to consider on remand whether those expenses were covered by the Act (Pet. App. A-10). Petitioner contends (Pet. 7) that respondent was obliged by its franchise agreement with the City of Norfolk to remove its equipment from public streets "without charge." Nothing in the court of appeals' opinion would appear to prohibit the district court from considering, on remand, whether respondent's right to payment under the Act is barred by contract.

of the Act was "to establish a uniform policy for the fair and equitable treatment of persons displaced as a result of * * * federally assisted programs * * *." 42 U.S.C. 4621. See *Alexander* v. *HUD*, 441 U.S. 39, 51 (1979). The court of appeals' construction furthers uniformity for programs covered by the Act.[2]

Moreover, it cannot be said that the result is unreasonable. Because we are dealing with regulated public utilities, the ultimate question in this case is whether relocation costs are to be borne by the utilities' customers or by the taxpayers. (The two groups do not always coincide.) It is reasonable to include all the expenses of redevelopment projects in the cost of the project itself, rather than to pass along some of these expenses to the utility's customers, in what amounts to a hidden tax.

Neither petitioner nor the numerous amici have been able to produce any legislative history that specifically indicates a congressional intent to exclude utilities from the broad definition of the Act, and we are aware of none.[3] Under

---

[2]Utilities may be treated differently under programs not covered by the Act; for example, amicus curiae City of Boise, Idaho, points out (Br. 29) that the Act left in effect 23 U.S.C. 123(a), which prohibits federal compensation for utility relocation expenses occasioned by highway improvement projects where state reimbursement is prohibited by state law. But that is no reason to deviate from uniformity in programs that *are* covered by the Act.

[3]The enactment by Congress two years later of the District of Columbia Public Utilities Reimbursement Act of 1972, Pub. L. No. 92-496, 86 Stat. 812, amending D.C. Code Ann § 5-704 (1967) does not, as suggested by petitioner (Pet. 16), necessarily indicate that Congress believed that utilities were excluded from the reimbursement provisions of the Act. Indeed, the District of Columbia statute indicates that Congress wanted utilities to be reimbursed. The statute provides for utility reimbursement in District of Columbia urban renewal projects without regard to federal financial participation. The statute also provides for utility reimbursement in interstate highway improvements undertaken by the District of Columbia, thus satisfying the requirement of 23 U.S.C. 123(a), discussed in note 2, *supra*, to allow federal funds to be used for utility relocation.

these circumstances, the court of appeals cannot be said to have erred in following the Act's plain language.

2. The decision of the court below does not conflict with the decision of any other court of appeals or any state supreme court. *Consumers Power Co.* v. *Costle*, 615 F. 2d 1147 (6th Cir. 1980), cited by the district court (Pet. App. B-5), is distinguishable, because in that case there was no acquisition of real property but only an upgrading of the streets. 615 F. 2d at 1148-1149, 1150. *Artesian Water Co.* v. *Delaware Department of Highways & Transportation*, 330 A.2d 441 (Del.), aff'g in part 330 A.2d 432 (Del. Super. Ct. 1974), involved reimbursement of utilities under a different statute, 23 U.S.C. 123(a), concerning highway reconstruction. See note 2, *supra*. Although the state trial court in *Mountain States Telephone & Telegraph Co.* v. *Boise Redevelopment Agency*, No. 52891 (Idaho Dist. Ct. Oct. 27, 1980) (reprinted at Pet. App. C-1 to C-23), agreed with the district court below, that decision is pending on appeal before the Idaho Supreme Court (see amicus curiae brief filed by City of Boise, Idaho, at 1-2). *Pacific Telephone & Telegraph Co.* v. *Redevelopment Agency*, 87 Cal. App. 3d 296, 151 Cal. Rptr. 68 (1978), also cited by petitioner (Pet. 13), construed a state statute. Should a conflict develop among the circuits or with a state supreme court, this Court can then consider whether it should decide the issue.

3. Although petitioner and the various amici argue that the reimbursement of utility removal expenses was not expected (despite the Act's plain language) and that this will upset settled expectations on the costs of projects regarding which additional funding is not available, that is an argument that should be directed to Congress. No judgment will be entered against petitioner until after the proceedings on remand are concluded. Thus, there is ample time for petitioner and its supporting amici to address their concerns to Congress.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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NOVEMBER 1982

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No. 81-2332

IN THE

Supreme Court of the United States

October Term, 1981

NORFOLK REDEVELOPMENT AND HOUSING AUTHORITY, a political subdivision of the Commonwealth of Virginia,
Petitioner,

v.

THE CHESAPEAKE and POTOMAC TELEPHONE COMPANY OF VIRGINIA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petition *Amicus Curiae* of the Corporation Counsel of the City of Albany, New York

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QUESTION PRESENTED.

Whether the Chesapeake and Potomac Telephone Company of Virginia, is a "displaced person" under the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, 84 Stat. 1894, 42 U.S.C. §§4601 et seq. (Uniform Relocation Act) when it seeks reimbursement for the cost of removing its distribution facilities from public rights-of-way in the execution of an urban renewal project funded in part by grants from the Department of Housing and Urban Development.

TABLE OF CONTENTS.

Page

Question Presented.....i

Interest of Amicus Curiae.....1

Summary of Argument.....2

REASONS FOR GRANTING THE WRIT.....4

1. New York State follows the Common Law rule which states that utility companies can not claim relocation benefits to offset expenditures necessary to bring utility lines in compliance with Urban Renewal plans adopted by a municipality.....4

2. The United States Court of Appeals for the Fourth Circuit has relied upon a tenuous statement of legislative polity to abruptly overturn the well established Common Law.....6

3. When a municipality is suddenly exposed to multi-million dollar liability as a result of a statutory interpretation which abrogates a well settled Common Law, that interpretation should be made by this court considering the substantial issues unearthed by such a radical change.....8

CONCLUSION.....11

TABLE OF AUTHORITIES.

Cases

Page

Alexander v United States Department of Housing and Urban Development, 441 U.S. 39 (1979).....6,7

Berman v Parker, 348 U.S. 39 (1954)....4

Matter of New York City Housing Authority v Muller, 270 N.Y. 333; 1 N.E.2d 153 (1939).....4

New Rochelle Water Co. v State of New York, 10 N.Y.2d 287; 29 N.Y.S. 2d 1; 176 N.E.2d 705 (1961).....4

New York City Tunnel Authority v Consolidated Edison Co., 295 N.Y. 467; 68 N.E.2d 445 (1946).....4,5

STATUTES

Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, 84 Stat. 1894, 42 U.S.C. §4601 et seq.....Passim

INTEREST OF THE AMICUS CURIAE

The City of Albany, New York respectfully submits this brief, pursuant to Rule 36 of the Rules of the Court.

The City of Albany is concerned about the rule, announced by the Court of Appeals for the Fourth Circuit, abrogating the Common Law rule by allowing utility companies to collect relocation benefits under the Uniform Relocation Act of 1970.

The City fears that if this new rule is applied in Albany, both past and future urban renewal projects, entered into by the City, could be substantially jeopardized.

SUMMARY OF ARGUMENT

The City of Albany, New York and the Albany Urban Renewal Agency, a municipal agency empowered under the laws of the State of New York to undertake urban renewal programs, have followed the well established Common Law rule that utility companies, with service lines within an urban renewal project area, are not generally entitled to benefits under either the Uniform Relocation Policies Act, 84 Stat. 1894, 42 U.S.C. §4601 et seq (hereinafter referred to as the Uniform Relocation Act), or any other state or local relocation entitlement program.

Twelve years after the passage of the Uniform Relocation Act, the Court of Appeals for the Fourth Circuit relied upon a Congressional Declaration to abrogate this Common Law in a post facto manner.

An application of this decision in New York State runs the risk of subjecting the City of Albany and the Albany Urban Renewal Agency to substantial and expected liability.

If the Common Law is to be so abrogated, then the Supreme Court should render such a decision giving due regard to the pragmatic issues exposed in the wake of this radical change.

REASONS FOR GRANTING WRIT

1. NEW YORK STATE FOLLOWS THE COMMON LAW RULE WHICH STATES THAT UTILITY COMPANIES CAN NOT CLAIM RELOCATION BENEFITS TO OFFSET EXPENDITURES NECESSARY TO BRING UTILITY LINES IN COMPLIANCE WITH URBAN RENEWAL PLANS ADOPTED BY A MUNICIPALITY.

New York State utility companies operate subject to the municipality's exercise of police power. New Rochelle Water Co. v State of New York, 10 N.Y.2d 287; 29 N.Y.S. 2d 1; 176 N.E.2d 705 (1961); New York City Tunnel Authority v Consolidated Edison Co., 295 N.Y. 467; 68 N.E.2d 445 (1946). The clearance of slums and urban renewal is an exercise of this police power. Berman v Parker, 348 U.S. 26 (1954); Matter of New York City Housing Authority v Muller, 270 N.Y. 333; 1 N.E.2d 153 (1936). Thus, "...public service corporations maintain their rights in the streets, subject to reasonable regulation and control, and are bound to relocate their

structures at their own expense whenever the public health, safety or convenience requires the change to be made." New York City Tunnel Authority, 295 N.Y. at 475.

The City of Albany, the Albany Urban Renewal Agency and the various concerned utility companies were convinced that the Uniform Relocation Act made no discernable change in this Common Law. Thus, in 1975 the City of Albany adopted, by resolution, the Albany Urban Renewal Agency South End Project No. 2 N.Y.R. 259.

In accordance with this plan and in reliance upon the Common Law stated above, the City of Albany ordered the various utilities within the project area to adjust their service lines. The City then addressed all reasonable relocation claims and has paid just compensation for the relocation of businesses and individuals who relocated out of the project area. At this late date, after many years of planning

and in reliance upon the Common Law stated above, the City of Albany has exhausted its funds earmarked for this project.

2. THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT HAS RELIED UPON A TENUOUS STATEMENT OF LEGISLATIVE POLICY TO ABRUPTLY OVERTURN THE WELL ESTABLISHED COMMON LAW.

As the Supreme Court noted in Alexander v United States Department of Housing and Urban Development, 441 U.S. 39 (1979), the "Declaration of Policy", S. 1, 91st Cong., 1st Sess. §201 (1969) prefacing the Uniform Relocation Assistance Act, states the purpose of that Act. This Declaration states that the purpose of the Uniform Relocation Act is

> ...to establish a uniform policy for the fair and equitable treatment of owners, tenants, and others displaced by the acquistion of real property in Federal and federally assisted programs to the end that such persons shall not suffer disproportionate injuries as a result of programs designed for the benefit of the

public as a whole. Alexander, 441 U.S. at 51.

The Court of Appeals for the Fourth Circuit, relying upon this "Declaration of Policy", claims that the Uniform Relocation Act is void of clear legislative intent to exclude utilities from claiming relocation benefits under the Act. Thus, the Court of Appeals states that Congress intended to create benefits for the utility companies under the Uniform Relocation Act. Therefore, according to the Court of Appeals, "reliance on the Common Law (at this time) is unconvincing."

It is this very "Declaration of Policy", which provides the legislative intent seemingly overlooked by the Court. A full reading of the quoted matter clearly demonstrates that Congress acted to insure that a "person shall not suffer disproportionate injuries as a result of programs designed for the benefit of the public as

a whole."

It is well established that utility companies can pass the costs of their adjustments in the project area along to utility users, therefore, the utility companies can hardly be termed victims suffering disproportionate injuries as a result of a project.

Absent the ability of the utility companies to show a bonifide injury and in light of the well-settled Common Law, known to Congress at the time of the passage of the Uniform Relocation Act, it is clear that Congress intended to exclude utilities from claiming benefits under the Act.

3. WHEN A MUNICIPALITY IS SUDDENLY EXPOSED TO MULTI-MILLION DOLLAR LIABILITY AS A RESULT OF A STATUTORY INTERPRETATION WHICH ABROGATES A WELL SETTLED COMMON LAW, THAT INTERPRETATION SHOULD BE MADE BY THIS COURT CONSIDERING THE SUBSTANTIAL ISSUES UNEARTHED BY SUCH A RADICAL CHANGE.

If the decision of the Court of Appeals

abrogating the Common Law was applied to the present situation in Albany, New York, as described above, the Albany Urban Renewal Agency engineers estimate that the cost of relocating utility lines in the Albany Urban Renewal Project No. 2 N.Y.R. 259 could approximate three million dollars.

The Court of Appeals for the Fourth Circuit has relied upon a Declaration of Policy, which has been shown to be subject to a substantially different interpretation, to abrogate a well established Common Law. The Court of Appeals failed to address such pragmatic issues as: 1) whether a utility has legally "relocated" when in fact, it never moves from a urban renewal project area or looses an interest in real property; and 2) where the municipality is to look for monies to satisfy its newly acquired liabilities in light of the fact that they have exhausted their federal entitlement for federal relocation benefits.

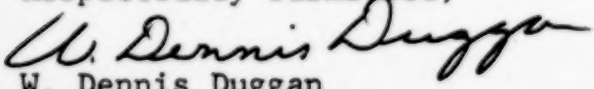
Therefore, the Supreme Court should review the decision of the Court of Appeals.

If in fact the Common Law is to be abrogated, at this late date and upon so tenuous an interpretation as that given by the Court of Appeals, then this Court is the proper forum for announcing such a change. This Court is the only forum which can properly consider the devastating nationwide impact such a decision would have; for the simple fact of the matter is, many cities such as Albany, New York, have no monies remaining in project coffers to fund what, at this time, would amount to a windfall profit to utility companies.

CONCLUSION

The United States Supreme Court should issue a Writ of Certiorari.

Respectfully submitted,



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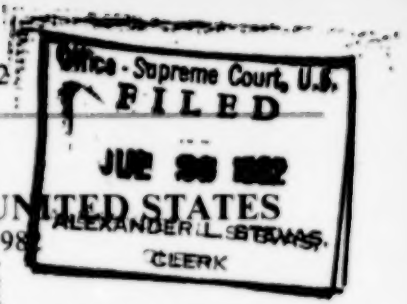
Docket No. 81-2332



IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 198

NORFOLK REDEVELOPMENT AND HOUSING AUTHORITY, a political subdivision of the Commonwealth of Virginia,

Petitioner,

v.

THE CHESAPEAKE AND POTOMACK TELEPHONE COMPANY OF VIRGINIA,

Respondent,

MOTION OF THE BOISE REDEVELOPMENT AGENCY FOR LEAVE TO FILE BRIEF AMICUS CURIAE IN SUPPORT OF PETITIONER

BRIEF OF THE CITY OF BOISE, A POLITICAL SUBDIVISION OF THE STATE OF IDAHO, AND THE BOISE REDEVELOPMENT AGENCY, A POLITICAL SUBDIVISION OF THE STATE OF IDAHO, AS AMICI CURIAE IN SUPPORT OF PETITIONER, NORFOLK REDEVELOPMENT AND HOUSING AUTHORITY

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IN THE
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OCTOBER TERM, 1982

No. 81-2332

NORFOLK REDEVELOPMENT AND HOUSING AUTHORITY,

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THE CHESAPEAKE AND POTOMACK TELEPHONE COMPANY OF VIRGINIA,

Respondent,

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MOTION OF THE BOISE REDEVELOPMENT AGENCY FOR LEAVE TO FILE BRIEF AMICUS CURIAE IN SUPPORT OF PETITIONER NORFOLK REDEVELOPMENT AND HOUSING AUTHORITY

The Boise Redevelopment Agency (BRA) respectfully moves the Court for leave to

file the attached Brief as an amicus curiae in support of the Petitioner, and, in the event such motion is needed, to file the attached brief out of time.

The interest of the BRA in the subject matter is more fully set out in the Brief. In summary, there is now pending before the Supreme Court of the State of Idaho a case entitled Mountain States Telephone & Telegraph Company, et al., Appellants, vs. Boise Redevelopment Agency, Respondent, Case No. 13997. In that case that court has before it the question of whether or not a public utility is a displaced person under the Uniform Relocation Assistance & Real Property Acquisition Policies Act of 1970, 42 U.S.C. § 4601, et seq., for the purpose of reimbursement for the cost of removing distribution facilities from public

rights-of-way caused by an urban renewal project funded in part by grants from the Department of Housing and Urban Development. Under Idaho law a public utility's use of rights-of-way is permissive, and the utilities bear the cost of relocating or removing facilities from such rights-of-way. The Idaho courts have, to date, recognized the status of utilities as permissive users, and refused them relocation assistance.

If the decision of the Court of Appeals of the Fourth Circuit is affirmed or is treated as controlling or persuasive authority in the Idaho case, it will have grave economic impact upon the BRA. The claims for utility relocation reimbursement could equal or exceed funds now set aside for completion of the urban renewal project within the City of Boise.

All funds now allocated for the project are necessary for its completion. In the event that the costs of the project were to be increased by utility relocation costs, the project may either become infeasible or may require the inclusion of public monies. The decision of the Fourth Circuit could, therefore, result in the application of local public monies to relocation assistance for public utilities despite the fact that local law gives those utilities no right to such funds.

Under Rule 36.2, this Brief is timely filed pursuant to Rule 36.1 in support of the Petition for Writ of Certiorari.

The BRA seeks to join in the attached Brief as amicus curiae with the City of Boise which is a political subdivision of the State of Idaho. Counsel for the BRA

in this matter have been appointed as special City Attorney for the purpose of appearances before this Court. Consent is not required pursuant to Rule 36.4 for the City of Boise's filing of an amicus curiae brief before this Court because it is a political subdivision of the State of Idaho. Consent of all parties has been sought for BRA participation as amicus curiae with the City of Boise. Petitioner has granted consent to the BRA to file an amicus brief in conjunction with the City of Boise, and Petitioner has filed with the Clerk of the Court its letter acknowledging that consent. The Chesapeake and Potomac Telephone Company of Virginia has withheld its consent to the BRA to file an amicus brief. For that reason the BRA now makes this motion for leave to join with the City of Boise

as an amicus curiae in support of Petitioner.

In the event that this Court denies the BRA leave to file as an amicus curiae with the City of Boise, Idaho, in support of Petitioner, the City of Boise still files the attached Brief as amicus curiae, without involvement of the BRA.

If an amicus curiae brief in support of Petitioner is timely only at the time Petitioner's principal brief is filed, BRA moves for leave to file the attached brief out of time and moves for leave to make the motion out of the time set pursuant to Rule 29.

WHEREFORE,

1. If the Boise Redevelopment Agency is required to seek leave of this Court to join in the filing of the attached brief as amicus curiae with the City of

Boise, the Boise Redevelopment Agency does so move.

2. In the event that it is necessary to seek leave of this Court to file the attached brief out of time, the Boise Redevelopment Agency respectfully moves for leave to make this motion and for leave to file the attached brief as amicus curiae with the City of Boise.

3. In the event this Motion should not be granted, the City of Boise would file the attached brief as amicus curiae without participation by the BRA.

RESPECTFULLY SUBMITTED.

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Docket No. 81-2332

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1982

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TABLE OF CONTENTS

	Page
Interest of the Amici Curiae	1
Statement of the Case	5
Summary of the Argument	6
Argument	10
I. The Decision of the Fourth Circuit Court of Appeals Departs from Settled Principles of State Common Law	10
A. The Fourth Circuit's Departure from Settled Law Will Jeopardize Completion of Existing Projects	10
B. Public Utilities Enjoy a Substantial Subsidy Under State Law, and the Circuit Court's Decision Will Unfairly Provide a Double Subsidy	14
II. Congress Did Not Intend Private Public Utilities To Receive Relocation Benefits Under The Uniform Relocation Act	17

A. The Legislative History Reveals A Purpose To

Page

Aid Displaced People Facing High Relocation Costs In Urban Areas . . . 17

B. The URA Was Intended To Apply Only Where There Existed And As A Supplement To A Right To An Eminent Domain Recovery Under The Fifth Amendment -- And There Is No Such Right Extended To Public Utilities 23

C. The URA Will Not Apply To Utility Relocation When Read Consistently With Other Federal Relocation Laws 28

III. The Fourth Circuit Court of Appeals Decision is Contrary To Settled Federal Case Law Which Denies Relocation Compensation To Utilities Enjoying Gratuitious Use Of Public Rights-Of-Way 34

IV. The California Relocation Act Provides By Analogy Persuasive Authority That the Plaintiffs Are Not Entitled to Relocation Benefits Under the Uniform Relocation Act 46

Conclusion 54

Appendix 56

TABLE OF AUTHORITIES

Cases	Page
Boise Redevelopment Agency v. Yick Kong Corporation, 94 Idaho 876, 499 P.2d 575 (1972).	12
City of Mountain View v. Superior Court, 54 Cal. App.3d 72, 126 Cal. Rptr. 358 (1975).	47
Consumers' Power Co. v. Costle, 615 F.2d 1147 (6th Cir. 1980) . .	6
Consumers Power Co. v. Costle, 468 F. Supp. 375 (E.D. Mich. 1979)	38,39,44
Lone Star Gas Co. v. Landrier, No. 52-100-C (1981)	7
Mountain States Telephone and Telegraph Co., et al. v. Boise Redevelopment Agency, 101 Idaho 30, 60 P.2d 1084 (1980).	5,11,26
Pacific Telephone & Telegraph Co. v. Redevelopment Agency of the City of Glendale, 87 Cal. App.3d 299, 151 Cal. Reptr. 68 (Cal. App. 1978)	48
Public Service Company of Oklahoma v. Harris, et al, No. 79-C-37 Bt (1980)	6

Statutes

18 C.F.R., Chapter 1, subpart c and f 16

47 C.F.R., Chapter B, parts 31 and 32 16

California Gov. Code, § 7260, subds. (b),(d) 47

California Gov. Code, § 7262. . . . 50

24 C.F.R. 42.1, et seq. 32

24 C.F.R. 42.195 32

24 C.F.R. 42.3 32

Idaho Urban Renewal Act, Idaho Code § 50-2001 et seq. 11

IPUC Rule 31 N, P and S 16

23 U.S.C. § 123(a). 29,30,31

42 U.S.C. § 4601, et seq. 2,54

42 U.S.C. § 4601(6) 48

42 U.S.C. § 4602 37

42 U.S.C. § 4622 45

42 U.S.C. § 4622(a) 37

42 U.S.C. § 4630 39,45

42 U.S.C. § 4655 39,45

Miscellaneous

58 Boston University Law Review 596 (1978). 25

House Report No. 91-1656 U.S. Code Congressional and Legislative News, 1970, 5861 20,21,22,36

Senate Report No. 91-488. 22,28

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INTERESTS OF THE AMICI CURIAE

The Idaho Supreme Court has before it, in the case of Mountain States Telephone and Telegraph Company, et al v. Boise Redevelopment Agency, Case No.

13977, the question of whether or not a public utility is a "displaced person" under the Uniform Relocation Act ("URA"), 42 U.S.C. 4601 et seq., when the utility seeks reimbursement for the costs of removing or relocating distribution facilities from public rights-of-way, which the utilities occupied without cost. The relocation in that case occurred in the execution of the Boise City urban renewal projects funded in part by federal grants from the Department of Housing and Urban Development. All briefs in that case have been submitted, but no date has been set for oral argument.

In the meantime, the United States Court of Appeals for the Fourth Circuit has entered its decision, which is the object of the Petition for Certiorari, on the same question as that before the

Idaho Supreme Court. The Fourth Circuit's decision is directly contrary to the decision of the lower Idaho court and of other courts which have addressed the issue. Nonetheless, because it is the most recent reported decision, the amici curiae fear that it will be treated as controlling or compelling authority by the Supreme Court of Idaho.

The impact of the opinion and judgment of the United States Court of Appeals for the Fourth Circuit will adversely impact the urban renewal project in Boise, Idaho. For example, the Boise Redevelopment Agency (BRA) has federal funds allocated to it by and through the City of Boise in a total amount of $6,154,000 to complete its urban renewal project, but the BRA has no authority to

levy taxes, ad valorem or otherwise. There are no further federal funds which can be obtained for the project other than those previously allocated. As it now stands all the funding for the Boise urban renewal project will barely meet its anticipated cost, if no further expenditure is required for utility relocation. However, anticipated claims for the entire urban renewal area by public utilities for relocation or removal of their facilities is approximately 1.5 million dollars. Consequently, any shortfall in funds necessary to complete the urban renewal project will either spell the death of the project as currently planned or require the City of Boise to fund the project out of its operating revenues.

The City of Boise faces the anomalous situation of reimbursing utilities for relocation of their facilities, even though those utilities use the public rights-of-way at their own risk under state law without cost or payment of a fee. Mountain States Telephone and Telegraph Co., et al v. Boise Redevelopment Agency, 101 Idaho 30, 607 P.2d 1084 (1980). In effect, the City of Boise could be faced with the situation of paying the utilities for relocation costs to which they are not otherwise entitled under state law.

STATEMENT OF THE CASE

The City of Boise and the Boise Redevelopment Agency (BRA) adopt the statement of the case as set forth in the Petition for Writ of Certiorari of the

Norfolk Redevelopment and Housing Authority, pp. 3-9.

SUMMARY OF THE ARGUMENT

The holding of the Court of Appeals for the Fourth Circuit[1] is contrary to the decisions of the Court of Appeals for the Sixth Circuit and the District Court for the Eastern District of Michigan in Consumers Power Co. v. Costle, 615 F.2d 1147 (1980) and 468 F. Supp. 375 (1979), respectively. It is also contrary to unpublished decisions of the Northern and Eastern Districts of Oklahoma, Public Service Company of Oklahoma v. Harris, et al., No. 79-C-37 Bt (1980) and Lone Star

---

1. This holding, sub nom, Norfolk Redevelopment and Housing Authority v. The Chesapeake and Potomac Telephone Company of Virginia, is the subject of the Petition for Certiorari before the Court.

Gas Co. v. Landrieu, No. 52-100-C (1981), and the California courts interpreting California's parallel statute. It dramatically upsets the settled law of the majority of American jurisdictions, by granting a compensable right in utilities which already enjoy a gratuitous use of the public's rights-of-way for their facilities.

The law of most American jurisdictions (including Virginia and Idaho) is that utilities enjoy the free use of public street and highway rights-of-way on the conditions that they do so at their sole risk, and that, if compelled to relocate their facilities they must do so at their sole cost. This rule represents a substantial subsidy to the utilities; it insulates them from land acqui-

sition costs, both for their original location and for any "relocation." The legislative and regulatory policy of most states is to limit the subsidy and to have costs of facility relocation spread among users through the rate base rather than among the public generally. The decision of the Fourth Circuit contravenes that policy and provides for a subsidy on top of a subsidy.

The language of the URA and its history do not support the Fourth Circuit decision. There is no statutory language changing the traditional treatment of utilities. Parallel state and federal laws and the administration of the federal regulations by the Department of Housing and Urban Development are contrary to the Fourth Circuit position. The legislative history of the URA and

its language focuses on hardships caused to urban dwellers who are subject to condemnation and then faced with significant relocation expense caused by high urban real property costs but not covered by condemnation proceeds. Utilities do not fall within these purposes of the law. They do not have (in most jurisdictions) a condemnable interest in public rights-of-way and, therefore, no eminent domain right to which relocation funds can be appended. Utilities do not require a new subsidy, having already a large existing subsidy immunizing them from high property costs. They can relocate for free. Utilities are not displaced urban dwellers within the purpose of the law.

Existing projects have been funded based upon the well-established law denying condemnation and attendant relocation

recoveries to utilities. The Fourth Circuit's decision threatens the viability of those projects. There are few new federal or local funds available for urban-area projects. The funding for existing urban renewal projects in Boise projects is becoming marginal because of inflation and interest rates. An imposition of relocation costs will stretch these funds. The judiciary should not take such action without clear statutory authority.

ARGUMENT

I.

THE DECISION OF THE FOURTH CIRCUIT COURT OF APPEALS DEPARTS FROM SETTLED PRINCIPLES OF STATE COMMON LAW

A. The Fourth Circuit's Departure From Settled Law Will Jeopardize Completion Of Existing Projects.

Idaho, as a majority of the states follows the common law rule requiring public utilities to relocate their facilities from public rights-of-way at their own expense. See, Mountain States Telephone and Telegraph Co., et al. v. Boise Redevelopment Agency, 101 Idaho 30, 607 P.2d 1084 (1980). In that case the Idaho Supreme Court interpreted the Idaho Urban Renewal Act, Idaho Code § 50-2001 et seq. and held that it did not require relocation compensation since the legislature neither abrogated nor abolished the common law rule, stating in part:

> . . . As indicated in State v. Idaho Power Co., supra, [81 Idaho 487, 346 P.2d 596 (1959)] this is a risk accepted by the utilities when they accept the use of public streets and highways, and we will not legislate a change in the area of compensation for relocation costs.

Urban renewal agencies and cities in the State of Idaho consequently have no potential liability under settled state law for payment of relocation costs to public utilities with facilities in public rights-of-way dislocated or displaced as the result of urban renewal.

The decision of the Fourth Circuit Court of Appeals could jeopardize the completion of the Boise urban renewal project. The estimated public utility relocation costs are substantial. There are no excess funds available to provide relocation monies for utilities. The BRA is not authorized under state law to levy taxes of any kind to pay for urban renewal. See, Boise Redevelopment Agency v. Yick Kong Corporation, 94 Idaho 876, 884, 499 P.2d 575 (1972). The BRA simply cannot spend beyond its own funds and

property holdings and faces the prospect of being incapable of completing the project as planned, if there is a shortfall.

The City of Boise faces an equally distressing problem. Pursuant to a specific finding that the downtown core suffered from deteriorating urban blight, the City of Boise created the BRA and approved its redevelopment plan on March 22, 1971. According to the approved plan, the BRA razed seven city blocks, partially developed three blocks, and have targeted four more city blocks for demolition. If the BRA cannot complete the redevelopment project because of this extra expense, the City of Boise faces the dilemma of having four razed and bare city blocks and numerous vacant buildings in the center of its downtown core without the resources to fund or complete the

redevelopment project with the attendant declining tax base and with urban blight more severe than prior to adoption of the redevelopment plan. Thus, either directly or indirectly, the City will have to cover the costs of utility relocation out of its own funds, not out of any federal subsidy.

B. Public Utilities Enjoy a Substantial Subsidy Under State Law, and the Circuit Court's Decision Will Unfairly Provide a Double Subsidy.

The cost of relocating public utility facilities from public rights-of-way should be borne by the public utilities as provided by state law. Public utilities, which occupy public rights-of-way without cost, already receive, in fact, a substantial subsidy from local govern-

ments in general by virtue of the free use of the public rights-of-way. They have no real property costs. Unlike other businesses in Idaho, public utilities receive this subsidy and with only a single caveat; i.e., placement of facilities in the public rights-of-way is at their own risk. Since these public utilities have no property cost, they have no property right in the public rights-of-way. Therefore, relocation compensation would provide a windfall to the utilities and, indeed, a second subsidy at the expense of local government such as the City of Boise and the BRA. The payment of relocation compensation to such public utilities would actually be payment by local governments to public utilities for their free use of public rights-of-way.

The equities weigh heavily against compensating public utilities for relocation costs, since they would in many instances receive, in effect, double payments for relocation costs. Idaho like many other states has adopted the Uniform System of Accounting for public utilities. For example, the Idaho Public Utilities Commission by rule, IPUC Rule 31, N, P and S, adopted the Federal Communication Commission and Federal Energy Regulatory Commission Rules on utility accounting. See 47 C.F.R., Chapter B, parts, 31 and 32; 18 C.F.R., Chapter 1, subpart c and f. Under these rules expenses of relocation and asset acquisition under these rules would be capitalized and added into the respective utility's rate base so that all users will then pay equally for the relocation

cost through increased rates. That is a express decision on the appropriate method for socialization of utility relocation costs, made by the government agency responsible for that specific issue regardless of the size of the utility's service area. The general public subsidy for utility location ends with the free land.

II.

CONGRESS DID NOT INTEND PRIVATE PUBLIC UTILITIES TO RECEIVE RELOCATION BENEFITS UNDER THE UNIFORM RELOCATION ACT

A. The Legislative History Reveals A Purpose To Aid Displaced People Facing High Relocation Costs In Urban Areas.

The legislative history shows that Congress enacted the URA for the purpose of compensating only those persons suffering from disproportionate costs and

expenses as a result of a Fifth Amendment taking. The URA provides only supplementary compensation rather than alternative compensation to displaced persons who have in some degree suffered a taking of real property.

Privately owned public utilities enjoying gratuitous use of the public rights-of-way cannot seriously argue that they suffer from the sort of social ill or malady which Congress sought to correct. Their rent-free use of the public rights-of-way has redounded to their advantage over the years as a direct subsidy from the general public by reducing their total operating costs. It would be incongruous to reward public utilities with relocation compensation for removing facilities from public rights-of-way which they have occupied

without cost. Moreover, it is doubly incongruous to pay the utilities relocation monies them to move to another free right-of-way.

The House Report on the Uniform Relocation Act clearly indicates Congress's purpose was to aid displaced people and not public utilities:

> . . . The need for such legislation arises from the increasing impact of federal and federally assisted programs as such programs have evolved to meet the needs of a growing and increasing urban population. In a less complex time, Federal and federally assisted public works projects seldom involved major displacements of people. There was relatively little taking of residential or commercial property for farm--to-market routes or for reservoirs or public buildings. Indeed, local support for such projects often resulted in little, if any, cost for land acquisition or rights-of-way. However, with the growth and development of an economy which is increasingly urban and

> metropolitan, the demand for public facilities and services has increasingly centered on such urban areas, and the acquisition of land for such projects has become the most difficult facet of many undertakings by public agencies. Also, a major public project -- be it a highway, urban renewal project, or hospital -- inevitably involves the acquisition and clearance of sites which now provide residential, commercial, or other services. As the thrust of Federal and federally assisted programs have shifted from rural to urban situations, it became increasinly apparent that the application of traditional concepts of valuation and eminent domain resulted in inequitable treatment for large numbers of people displaced by public action. [Emphasis added]

House Report No. 91-1656 at U. S. Congressional & Legislative News, 1970, pp. 5850-5851.

> This legislation refines and strengthens the basic principles and programs in S.1. as passed by the Senate. It provides a humanitarian program of relocation payments, advi-

> sory assistance, assurance that comparable, decent, safe, and sanitary replacement housing will be available for displaced persons prior to displacement, economic adjustments, and other assistance to owners and tenants displaced from their homes, farms and places of business. It establishes a uniform policy on real property acquisition practice for all Federal and federally assisted programs. And, perhaps most important of all, it gets to the heart of the dislocation problem by providing the means for positive action to increase the available housing supply for displaced low and moderate income families and individuals.

House Report No. 91-1656 at U. S. Congressional & Legislative News, p. 5052 (1970)

Congress recognized the inequities resulting from the strict application of eminent domain concepts to large numbers of persons living in urban regions. Hence, the Congress enacted this legislation to provide supplementary compensation to people suffering from a Fifth

Amendment taking of property. Consider for example:

> The lack of decent, safe and sanitary rental housing for displaced . . . families and individuals, at rentals they can afford, presents the most difficult of all relocation problems. These persons are generally tenants at will for suffrance who receive no compensation whatever upon displacement under eminent domain concepts of just compensation.

House Report No. 91-1656, supra, at p. 5861.

The Senate Report on the Uniform Relocation Act also states that the act "is designed to permit the federal government to deal consistently and fairly with all those whose property is taken for public projects and all those who are displaced from their homes and businesses." Senate Report No. 91-488.

B. The URA Was Intended to Apply Only Where There Existed And As a Supplement To A Right To An Eminent Domain Recovery Under the Fifth Amendment -- And There Is No Such Right Extended To Public Utilities.

Running throughout these expressions of legislative purpose is an implicit congressional concern for persons who, once displaced, are faced with high costs of scarce urban real property when they relocate. Such concerns are uniquely inapplicable to public utilities, since their original location was subsidized with free land, and since their relocation is subsidized with more free land. In exchange for that very substantial subsidy, the law of most states, including Idaho, cuts off the subsidy only to the extent of requiring that, on

the relatively few occasions when they are moved, the utilities pay their own costs of moving to their next free right-of-way.

Congress did not intend to aid or assist utilities who gratuitously use public rights-of-way. Indeed, the URA is supposed to be a "people-oriented bill" to compensate those who would ordinarily be denied it through the operation of the principle of just compensation when there is a taking. One commentator explains the scope of the URA as only providing supplementary compensation to a Fifth Amendment taking:

> . . . The context of the Act strongly suggests that Congress intended the URA to play a purely supplementary roll to the existing mechanism of Fifth Amendment compensation. The problem that Congress sought to address in the Act, and in the piecemeal legislation that pre-

ceded it, was manifestly not the lack of compensation in non-fifth amendment acquisitions, but was instead the failure of the Fifth Amendment to compensate all losses in cases in which the amendment did not apply. Congress otherwise would not merely have created legislation directed only at displacement costs. Rather, Congress would have provided that the government pay fair market value for the actual property lost in non-fifth amendment acquisitions.

Any interpretation of the URA that allows displacement compensation in the absence of an award of just compensation would create the anomalous situation in which a displacee might collect compensation for displacement costs but not be compensated for the market value of the property actually acquired. Congress should not be presumed to have intended such a result except in those situations in which it has made its intent unmistakeably clear. (Emphasis supplied) Note, 58 Boston Univ. L. Rev. 596, 690 (1978).

The Supreme Court of Idaho has held that a public utility's use of the public

rights-of-way is permissive in the case of Mountain States Telephone and Telegraph Co. v. Boise Redevelopment Agency, 101 Idaho 30, 607 P.2d 1084 (1980), stating:

> There is no taking of property here, as we have noted above, merely the termination of a license to use particular streets.

607 P.2d at 1089, 101 Idaho at 35.

If a public utility had possessed an interest in real property which, if then, was compensable under state law if taken, then the supplementary compensation provided by the URA would apply. Consider, for example, Senator Muskie's statement on the Senate version of the Uniform Relocation Act:

> . . . the Uniform Relocation Assistance and Land Acquisition Policies Act of 1969, is de-

signed to provide for uniform and equitable treatment of persons displaced from their homes, businesses, or farms by a federal or federally assisted programs, and to establish uniform and equitable land acquisition policies for federal and federally assisted programs.

The accelerating demands for public services of all kinds, and the attendant growth in population, particularly in urban areas, has brought with it the shattering effect of people displaced from their homes, their neighborhoods, and their businesses to make way for public projects. . . .

In large part, S. 1 is designed to permit the federal government to deal consistently and fairly with all those whose property is taken for public projects and all those who are displaced from their homes and their businesses. It follows as closely as possible the substantive provisions of the Housing and Urban Development Act and the Federal Highway Act, modifying them only as necessary to achieve a system of requirements and aids that can be applied uniformly in all federal and federally assisted programs. . . . [Emphasis supplied]

Senate Report No. 91-488.

Surely public utilities cannot claim they suffer from the "shattering effect" of displacement of which Senator Muskie spoke? They are largely immune to high costs of urban land. Moreover, the public utilities cannot claim that their property has been taken, since, as in Idaho, they only have a permissive use of the public rights-of-way.

C. **The URA Will Not Apply To Utility Relocation When Read Consistently With Other Federal Relocation Laws.**

The selective repeal of other prior legislation providing for relocation compensation illustrates an express indication of legislative intent to deny relocation benefits to public utilities. The URA conspicuously failed to repeal

any prior law which denied compensation to utilities for relocation or moving expenses. For example, in repealing Chapter 5 of the law dealing with the Federal-Aid Highways Act, Congress retained 23 U.S.C. 123(a) which prohibits federal compensation for relocation of utility facilities unless expressly required by state law. 23 U.S.C. 123(a) provides in part:

> When a state shall pay for the cost of relocation of utility facilities necessitated by the construction of a project on the Federal aid primary or secondary systems or on the interstate system, including extensions thereof within urban areas, Federal funds may be used to reimburse the State for such cost in the same proportion as Federal funds expended on the project. Federal funds shall not be used to reimburse the State under this section when the payment to the utility violates the law of the State or violates a legal contract between the utility and the State . . .

Congress chose only to repeal those provisions of Chapter 5 of Title 23 relating to relocation assistance in general and intentionally left 23 U.S.C. 123(a) standing. The federal-aid highway and interstate system is one of the largest federal programs contributing to the dislocation of public utilities. Yet, Congress required that state law be paramount in determining the reimbursement of states for relocating utilities. This is consistent with Senator Muskie's remarks indicating that the Uniform Relocation Act did not alter the substantive provisions of either the Housing and Urban Development Act or the Federal Highways Act.

While the Housing and Urban Development Act lacked a provision paralleling

23 U.S.C. 123(a), the Department of Housing and Urban Development nonetheless promulgated a rule to the same effect in its handbook prescribing the federal policies and requirements applicable to a local planning agency for urban renewal projects under Title 1 of the Housing Act of 1949 as amended:

> Removal or relocation of utility lines owned by a private utility company will not be allowed as a project expenditure unless compensation to the company is required under applicable state statutes, judicial decisions, or pre-existing local ordinances or provisions of the company's franchise. If the LPA (local planning agency) is required to compensate the utility company for proposed changes, the necessity for making the changes and the basis used in computing the estimated amount of such compensation shall be described. A legal opinion as to the obligations of the LPA to provide the compensation indicated shall be provided with the Part I loan and grant application.

(A copy of Chapter 2, "Site Clearance: HUD Handbook is attached in Appendix A)

The Housing Act of 1949, as amended, is the seminal legislation for urban renewal projects, and it is under this Act that the BRA received its funding for its urban renewal projects. Pursuant to this act HUD has by regulation clearly excepted privately owned utilities from relocation costs under the 1949 Housing Act. The HUD regulations implementing the URA, 24 C.F.R. 42.1 et seq., control state agency action:

> All determinations or other actions provided by the state agency provided for under the regulations in this part shall be undertaken in accordance with policies and requirements of HUD as issued from time to time.

24 C.F.R. 42.195. (Superseded, but see 24 C.F.R. 42.3 (1981).)

The policies and requirements of HUD for the payment of utility relocation costs under the Housing Act of 1949 have remained unchanged despite the passage of the Uniform Relocation Act. Narrow adherence to the provisions of the URA and its regulations will result in an improper interpretation of the URA in conflict with the HUD policies and requirements.

HUD urban renewal policies predated the enactment of the URA and have remained unchanged for twelve years. HUD policy defers to the law of the state and the law in Idaho clearly and unequivocally denies compensation to public utilities for relocation of their facilities from public rights of way. The URA is not funded by Congress for relocation compensation, but instead, as a result of

the Fourth Circuit Court of Appeals decision, relocation compensation will be borne by local government, which is ill-equipped to bear such costs.

III.

THE FOURTH CIRCUIT COURT OF APPEALS DECISION IS CONTRARY TO SETTLED FEDERAL CASE LAW WHICH DENIES RELOCATION COMPENSATION TO UTILITIES ENJOYING GRATUITIOUS USE OF PUBLIC RIGHTS-OF-WAY

The Fourth Circuit Court of Appeals decision has ruled that the Uniform Relocation Act created rights not recognized at common law. In concluding that a public utility was a "displaced person" under the URA, the Fourth Circuit Court of Appeals reasoned that a public utility was similar to a tenant at will:

> A tenant at will, for example, can recover relocation as a displaced person under the act

> even though the common law recognize no such right. The plaintiff in this case in certain respects, is similar to a tenant at will because it has a right to use the city's streets for its lines only at the will of the city. Petitioner's Appendix, A-6.

However, the Circuit Court's analogy is inapposite. Public utilities are neither renters nor lessees of real property. Indeed, public utilities unlike renters or lessees use the public rights-of-way freely without any payment.

Consequently, the public utilities' use of public rights-of-ways is gratuitous while that of the renter or lessee of real property is contractual, requiring payment. Hence, the utility enjoys a substantial public subsidy at both its original free location and its new, equally free, "relocation." An ordinary tenant at will, conversely, will pay for

the right to use both his old and new site, without any subsidy except relocation funds. Congress certainly sought to aid families and individuals who are renters and who require decent, sanitary housing. See, House Report No. 91-1656 U.S. Code Congressional and Legislative News, 1970, 5861.

Next, the Fourth Circuit Court of Appeals reasoned that the legislative history of the URA provided little reason to exclude public utilities from its coverage. The court said that the act was intended to establish uniform and fair policy for the treatment of owners, tenants and others displaced by the acquisition of real property in federal and federally assisted programs, to the end that such people shall not suffer disproportionate injuries. The courts'

interpretation of the URA policy ignores that part of the act's legislative history which indicates that the URA was to be a "people-oriented bill." First, the URA provides only supplementary compensation to persons suffering from a Fifth Amendment taking of property. Second, the URA provides for two types of compensation: relocation assistance (subchapter II), and compensation for taking of property (subchapter III). Subchapter III, however, does not create or expand a person's rights or liabilities for compensation upon a taking of property. 42 U.S.C. 4602. Finally, relocation assistance under subchapter II is contingent upon the acquisition of real property under a federal program or federally assisted program. 42 U.S.C. 4622(a). Under the settled law of Idaho

and a majority of the states a public utility does not acquire any right in public rights-of-way and places its facilities in those public rights-of-way at its own risk. There is no property right and, therefore, no eminent domain taking.

The Fourth Circuit Court of Appeals decision holding that the Chesapeake and Potomac Telephone Company of Virginia was a "displaced person" within the meaning of the Uniform Relocation Act is contrary to Consumers' Power Co. v. Costle, 615 F.2d 1147 (6th Cir. 1980). In that case a gas and electric company filed an action for declaratory and injunctive relief against the administrator of the Environmental Protection Agency. In count one of the complaint Consumers Power Co. sought compensation under the

real property acquisition section of the URA (subchapter III). The gas company claimed that it did not receive satisfactory assurances from the cities that fair compensation would be paid as required by 42 U.S.C. § 4655. On the other hand, in count two Consumers Power Co. claimed relocation compensation under the relocation section (subchapter II) and again alleged failure to receive satisfactory assurances from the cities as required by 42 U.S.C. § 4630.[2]

In the lower court the defendant EPA moved to dismiss the complaint on several grounds, arguing first that the plaintiffwas not a displaced person within the

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2. A summary of the utility's allegations in its complaint are found in the district court opinion, Consumers Power Co. v. Costle, 468 F. Supp. 375 (E.D. Mich. 1979).

meaning of the act, since there had been no acquisition of any real property interest; second, that the act created no new property rights; and third, the claim was not yet ripe for judicial review, since there had been no final agency action. The district court agreed and held that the utility was not a "displaced person" under the URA, stating with persuasive reasoning:

> The Uniform Relocation Assistance Act, 42 U.S.C. §§ 4601-4655, provides financial relief to persons, including corporations, injured by the acquisition of real property by a state or federal agency using federal funds. The language of the act makes it clear that it applies only in cases in which there has been an acquisition of property. Moorer v. Department of Housing & Urban Development, 561 F.2d 175, 178 (8th Cir. 1977); Whitman v. Missouri State Highway Comm'n, 400 F. Supp. 1050, 1067 (W.D.Mo. 1975). For example, subchapter II of the act makes benefits

available to "displaced persons", defined in the act as persons required to move "as the result of the acquisition of such real property." § 4601 (6); see also §§ 4622, 4625 and 4630. Subchapter III is entitled "Uniform Real Property Acquisition Policy," and every section in that subchapter is concerned with the consequences of the acquisition of property.

It is true that in some cases courts have construed the act to require relocation assistance even though the acquisition of real property was inadvertent, as, for example, in the case of HUD mortgage default. See Cole v. Harris, 571 F.2d 590 (D.C.Cir. 1977). However, most courts require that the acquisition be pursuant to a conscious governmental decision to dislocate in order to find an entitlement to benefits. See, e.g., Harris v. Lynn, 555 F.2d 1357 (8th Cir. 1977), affirming 411 F.Supp. 692 (E.D.Mo. 1976); Alexander v. United States Department of Housing & Urban Development, 555 F.2d 166 (7th Cir. 1977); Caramico v. Secretary of Housing and Urban Development, 509 F.2d 694 (2nd Cir. 1974). Under either interpretation of the act, however, there must be

an acquisition of property. Thus in order that plaintiff be entitled to relief under this act, it must first demonstrate that it has been damaged by the acquisition of real property in connection with a disbursement of federal funds.

It has been held, as the plaintiff argues, that a grant of the right to place and maintain pipes in a street is the grant of a property right. See, e.g., Owensboro v. Cumberland Telephone & Telegraph Co., 230 U.S. 58, 65, 33 S.Ct. 988, 57 L.Ed. 1389 (1913). However, the utility, which normally acquires its easement through a gratuitous grant, does not thereby acquire a right to any specific location in which to lay its pipes. New Orleans Gaslight Co. v. Drainage Comm'n of New Orleans, 197 U.S. 453, 461, 25 S.Ct. 471, 49 L.Ed. 831 (1905). Tennessee v. United States, 256 F.2d 244, 258 (6th Cir. 1958). Thus, in the present case, although plaintiff has incurred and will incur costs as the result of the federal grants to the cities involved, it has not lost any property right, since it may still maintain its pipes in the same ground. New Orleans Gaslight Co., supra, 197

U.S. at 460, 25 S.Ct. 471; Detroit v. Michigan Bell Telephone Co., 374 Mich. 543, 554-55, 132 N.W.2d 660 (1965) (dissent), cert. denied, 382 U.S. 107, 86 S.Ct. 256, 15 L.Ed.2d 191 (1965); cf. Center Line v. Michigan Bell Telephone Co., 387 Mich. 260, 196 N.W.2d 144 (1972)(reimbursement dependent upon specific legislative provision). It certainly cannot be argued that the cities of Flint, Jackson, and Bay City have now acquired the right to lay gas pipeline or that they have taken that right from the plaintiff. In Detroit Board of Education v. Michigan Bell Telephone Co., 51 Mich.App. 488, 502, 215 N.W.2d 704, 711 (1974) aff'd, 395 Mich. 1, 232 N.W.2d 633 (1975), the Michigan Court of Appeals noted: "A distinction can be drawn between the shift of equipment to accomodate a drainage system and the total extinguishment of a vested property right." See generally Center Line v. Michigan Bell Telephone Co., supra (right of reimbursement resulting from legislative provision in Rehabilitation of Blighted Areas Act; no common law right). The cost of relocation is not the acquisition of a property right but rather the cost of doing business.

Center Line, supra, 387 Mich. at 267, 196 N.W.2d 144 (Swainson, J., dissenting).

On appeal the Sixth Circuit Court of Appeals found that the utility's complaint stated no cause of action under presently applicable state and federal law and affirmed the decision of the district court on all grounds. The opinion is, however, somewhat misleading, since it does not focus on whether a public utility is a "displaced person" under the URA. A close reading of the district and circuit opinions show that both cases stand for the proposition that a "public utility" is not, in fact, a "displaced person" under the URA.

The Sixth Circuit Court of Appeals in Consumers Power Co. v. Costle, supra, devoted considerable attention to the issue of whether or not the utility had a

claim for compensation under 42 U.S.C. § 4655 which is in subchapter III of the URA. The Sixth Circuit, however, quoted with approval the district court's discussion of permissive use of public rights-of-way by public utilities. Finally, the circuit court held that utility's complaint stated no cause of action under applicable state and federal law. This holding necessarily denies the utility's claim for reimbursement under subchapter II of the URA and specifically 42 U.S.C. § 4630 and 42 U.S.C. 4622. Therefore, despite the court's attention to compensation under subchapter III of the URA, the Consumers Power Co. decision is contrary to the decision of the Fourth Circuit Court of Appeals in the instant case, since the Sixth Circuit expressly held the utility was not a "displaced

person" within the meaning of the URA and as such represents a split of authority among the circuit courts.

IV.

THE CALIFORNIA RELOCATION ACT PROVIDES BY ANALOGY PERSUASIVE AUTHORITY THAT THE PLAINTIFFS ARE NOT ENTITLED TO RELOCATION BENEFITS UNDER THE UNIFORM RELOCATION ACT

California case law holds that a public utility is not a "displaced person" under the state relocation act. In 1970, the Congress enacted the Uniform Relocation Act requiring the federal government to provide relocation and advisory assistance to affected persons, and that it follow uniform acquisition policies, whenever it acquired real property under its power of eminent domain. In 1971, the California Legislature

amended and augmented its relocation assistance law to parallel the 1970 federal enactment and to extend comparable benefits statewide and payable by the state and its political subdivisions to persons affected by the acquisition of land under its eminent domain. See, City of Mountain View v. Superior Court, 54 Cal. App.3d 72, 126 Cal. Rptr. 358 (1975).

Under the California Relocation Act a displaced person is defined as:

> . . . Any person who moves from real property, or who moves his personal property from real property, as a result of the acquisition of such real property, in whole or in part, by a public entity or by an person having an agreement with or acting on behalf of a public entity, or as the result of a written order from a public entity to vacate the real property, for public use. . .

Gov. Code, § 7260(c).

This definition of "displaced person" parallels and is almost identical to the definition of "displaced person" in 42 U.S.C. § 4601(6) with the only difference being California's modification of the definition of "displaced person" to conform to its state rather than federal programs.

The case of Pacific Telephone & Telegraph Co. v. Redevelopment Agency of the City of Glendale, 87 Cal. App.3d 299, 151 Cal. Rptr. 68 (1978), specifically addressed the issue of whether or not a public utility was a "displaced person" under the California Act. The City Council of Glendale adopted a redevelopment plan for a shopping center, and the enabling ordinance pledged the City of Glendale to cooperate with the Redevelopment Agency in closing, vaca-

ting, widening or changing the grades of streets, alleys and other public rights--of-way in the project area. Pacific Telephone and Telegraph Company had for a number of years owned, maintained and operated underground telephone cables and related facilities within the redevelopment area. The Redevelopment Agency notified the utility that it would be required to relocate or protect its telephone facilities to make way for the redevelopment project, since one of the affected streets would be vacated. The utility relocated its facilities subject to the parties' agreement to litigate the Redevelopment Agency's liability for reimbursement of the relocation cost. The utility filed suit to compel payment of its relocation cost contending such payment was required under Government Code

§ 7262 (The California Relocation Act). The trial court held that as a matter of law the utility was not entitled to such benefits and must bear its own expenses of relocating its facilities. The court of appeals affirmed the trial court stating:

> We find no merit to appellant's argument that the legislature has specifically so provided in the relocation assistance law. That law provides that as a part of the cost of acquisition of real property for a public use a public entity shall compensate a displaced person for his "[a]ctual and reasonable expense in moving himself, family, business, or farm operation, including moving personal property." (Gov. Code, § 7262, subd. (a)(1).) "Person" is defined to include a corporation, and "business" is defined to include any lawful activity conducted primarily for the sale of services to the public. (Gov. Code, § 7260, subds. (b),(d).) "Displaced person" means "any person who moves from real

property, or who moves his personal property from real property, as a result of the acquisition of such real property, in whole or in part, by a public entity or by any person having an agreement with or acting on behalf of a public entity, or as the result of a written order from a public entity to vacate the real property, for public use." (Gov. Code, § 7260, subdv. (c).)

Appellant contends that these definitions are all-inclusive, and that appeallant fits within them, as being a person who was compelled to move its personal property, to wit, telephone cables, as a result of the vacating of the street for a public use. Appellant contends that since no provision of the relocation assistance law specifically excludes reimbursement of utility relocation costs, the broad general definitions indicate a legislative intent that the common law rule not apply.

We disagree. An intent to exempt utilities from the common law rule cannot be inferred merely from the broad general definitions used in the relocation assistance law. There are

numerous statutes in which the Legislature has specifically and expressly provided for reimbursement of utility relocation expenses. [citation omitted.] As stated in Pacific Tel. & Tel. Co. v. Redevelopment Agency, supra, 75 Cal. App. 3rd at page 965, footnote 4, 142 Cal. Rptr. at page 589, n. 4, "When the Legislature intends that a utility be reimbursed for its relocation costs, it has said so in specific and direct language [citing examples]." There the court rejected a similar argument by Pacific Telephone and Telegraph Company that the general definitions used in the community redevelopment law impliedly showed a legislative intent to avoid the common law rule. (Id., 75 Cal. App. 3rd at pp. 962-968, 142 Cal. Rptr. 584). So here, it is reasonable to assume that had the Legislature intended the common law rule not to apply, it would have adopted language similar to that found in the many other acts wherein it specifically provided for reimbursement. (L.A. County Flood Control Dist. v. Southern Cal. Edison Co., supra, 51 Cal.2d at p. 337, 331 P.2d 1).

> Whether the costs of such relocation should be shifted from the utility's rate payers to other taxpayers is a matter of policy for the Legislature to determine. (Pacific Tel & Tel Co. v. Redevelopment Agency, supra, 75 Cal. App.3d at p. 968, 142 Cal. Rptr. 584, A Study Relating to Sovereign Immunity, supra, 5 Cal. Law Revision Com. Rep., p. 80; Van Alstyne, Taking or Damaging by Police Power: The Search for Inverse Condemnation Criteria (1971) 44 So.Cal.L.Rev. 1, 53-56 (1971); Note 6 UCLA L.Rev. 336, 338 (1959).) The Legislature has not so shifted the burden in the relocation assistance law.

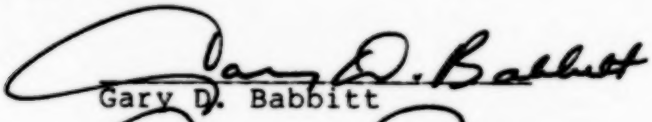
The same reasoning employed by the Court in Glendale is applicable to the instant case. The URA's definitions are not all inclusive. In an urban renewal project where local funds are included with federal funds it is inconceivable that Congress would intend to legislate a change in state law affecting the use of local monies without expressly so stat-

ing. In the absence of express language to the contrary, Congress should not be presumed to have altered the common law rule.

CONCLUSION

We ask that this Court accept review of the decision of the Court of Appeals for the Fourth Circuit in Norfolk Redevelopment and Housing Authority v. The Chesapeake and Potomac Telephone Company of Virginia, and that it reverse that decision. We further ask that this Court hold that public utilities in states which allow gratuitous use of public rights-of-way with no real property interest in those rights-of-way, are not "displaced persons" with a right to relocation funds under 42 U.S.C. 4601 et seq.

Respectfully submitted this 22nd day of July, 1982.



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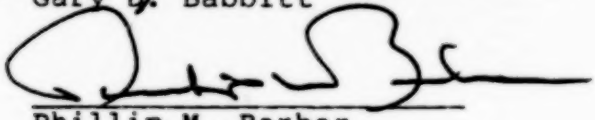

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CHAPTER 2. SITE CLEARANCE

ELIGIBLE ACTIVITIES

Site clearance may include the following within the project area when necessary for carrying out the objectives of the Urban Renewal Plan:

(1) Demolition of structures, removal of slabs on grade, removal of foundations to required elevations, breaking up basement slabs to prevent seepage, and filling of basements with suitable material.

(2) Breaking up and removing of abandoned street paving, curbs, gutters, and sidewalks.

(3) Necessary removal of abandoned utility mains and adjustments to facilities which are to remain.

(4) Moving of acquired structures on their present lots or on other lots within the project area, except that expenditures for improving the structures, providing new foundations or utility connections, landscaping, and similar items involved in preparing the property for resale are ineligible.

(5) Moving structures of historic or architectural value which will be restored and maintained for historic or architectural purposes.*

(6) Relocating underground of overhead utility distribution lines. (See below.)

The cost of these site clearance activities may be charged to Item 1 of Gross Project Cost or may be offered as an Item 2 noncash local grant-in-aid.

*MOVING STRUCTURES OF HISTORIC OR ARCHITECTURAL VALUE WHICH WILL BE RESTORED AND MAINTAINED FOR HISTORIC OR ARCHITECTURAL PURPOSES.[1]/

General Conditions and Requirements

The following conditions govern the moving of structures of historic or architectural value which will be restored and maintained for historic or architectural purposes:

1. Properties must conform with criteria to demonstrate historic or architectural value. (See 7207.1, Project Planning, Chapter 2, pages 4 through 4-5.)

1/With reference to moving activities, the term "structures" includes by definition "structures" and "buildings".

2. The moving must be clearly necessary to accomplish the objectives of the Urban Renewal Plan. The LPA must consider alternative plans which would permit the structure to remain in its present location, and must demonstrate why the objectives of the Plan could not be accomplished by any of these alternative plans.

3. The structure may be moved to any site within the urban renewal area or to any site outside of the urban renewal area which is within the locality subject to HUD review and approval. In all cases, the LPA must show that the proposed relocation site is suitable. If the structure is to be moved outside of the urban renewal area, the LPA must comply with the "Conditions Under Which Buildings May be Moved Off-Site." (See below.)

4. The exterior of any structure moved and resited at project expense shall be accessible to the public view at its relocation site. Public access to the interior of the structure is not required.

5. The LPA need not own the structure in whole or in part either before, during or after the actual moving. The LPA must, however, undertake the moving itself, either by letting contracts or with force account labor, in accordance with appropriate loan and grant contract provisions and Department regulations.

6. The structure need not require restoration to be eligible for moving.

7. The moved structure must be restored, if necessary, and it must be maintained for historic or architectural purposes. The latter must be assured by the LPA in accordance with the following:

a. If the structure is to be moved to a site within the urban renewal area which is not owned by the LPA, the owner of the relocation site must record in his deed, in accordance with local practice, a covenant running with the land which assures restoration and maintenance of the structure for historic or architectural purposes, puruant to criteria established by the LPA. This deed restriction should be recorded prior to moving of the structure, if possible. If not possible, an LPA-owner agreement must assure that the deed restriction will be recorded after the moving. An LPA-owner agreement by itself is not sufficient to guarantee the legislative objectives for restoration and maintenance.

b. If the structure is to be moved to a site outside the urban renewal area, the same procedure as in "a" above must be followed, but the municipality must be a party to the covenant. As part of the final approval of this procedure, there must be assurance that the munici-

pality has the legal authority to enforce the covenant.

c. If the structure is to be moved to a site owned by the LPA within the urban renewal area, disposition documents shall reflect restoration and maintenance requirements. (See 7207.1, Project Planning, Chapter 2, pages 4 through 4-5)

8. The LPA shall determine that the owner of the structure possesses the qualifications and financial resources (or can reasonably be expected to have such resources) to restore the property as necessary and to maintain it for historic or architectural purposes.

9. Structures acquired by the LPA for relocation or removal to another site shall be disposed of at fair market value.

Eligible Project Costs

The following are eligible project costs:

1. Moving of the structure from the original to the relocation site.

2. Rough grading of the relocation site and provision of a suitable foundation for and necessary utility connections to the moved structure.

3. If shown to be the most feasible method for moving, dismantling of the structure, marking and crating of the

pieces, and reassembling of the pieces on the relocation site. If storage charges are incurred, they will be eligible project costs only for the period during which project activities preclude the moving of the crated pieces to the future site.

4. Other activities which are clearly incidental to the moving.

5. $50,000 is the maximum which the project may incur for the activities listed in items 1-4 above for any single structure. This amount may be used in conjunction with other public or private funds if moving costs exceed $50,000.

CONDITIONS UNDER WHICH BUILDINGS MAY BEMOVED OFF-SITE

The cost of moving buildings off-site may not be charged to the project unless, as discussed above, the buildings are of historic or architectural value and will be restored and maintained for historic or architectural purposes.

However, the LPA may permit owners or purchasers to relocate buildings to sites outside of the project area, subject to requirements and restrictions that are adequate to assure that each building will be established on a suitable new site and be a sound and standard structure in every respect. In order to give assurance that urban renewal operations in one section of a community will not result in the creation or expansion of blighted conditions in another area, the

LPA shall obtain prior HUD approval for the moving of buildings off-site.

To obtain HUD approval, the LPA shall submit a full description of the circumstances under which buildings would be moved. The description shall include:

(1) Type and number of structures proposed for off-site moving.

(2) Size of the lots on which the buildings might be located.

(3) Type of land use that would be acceptable in areas to which the buildings would be moved.

(4) Steps to be taken to prevent moving of residential structures in other deteriorated areas or in good residential areas where incompatibility of the moved structures with existing development might produce blighting influence.

(5) Requirements relating to zoning and to environmental factors, such as conditions of streets and other public utilities, adequacy of community facilities, and accessibility and adequacy of public transportation.

(6) Requirements relating to the physical character or condition of structures and compliance with local codes and regulations which are to be made a condition of their relocation.

REMOVAL OR RELOCATION OF PRIVATELY OWNED UTILITY LINES

Removal or relocation of utility lines owned by a private utility company will not be allowed as a project expenditure unless compensation to the company is required under applicable State statutes, judicial decisions, or preexisting local ordinances or provisions of the company's franchise. If the LPA is required to compensate the utility company for proposed changes, the necessity for making the changes and the basis used in computing the estimated amount of such compensation shall be described. A legal opinion as to the obligations of the LPA to provide the compensation shall be described. A legal opinion as to the obligations of the LPA to provide the compensation indicated shall be provided with the Part I Loan and Grant Application. (See 7209.1, Site Preparation and Project Improvements, Chapter 3.)

UNDERGROUND PLACEMENT OF UTILITY DISTRIBUTION LINES

While the policy on conformance with local standards set forth in 7209.1, Site Preparation and Project Improvements, Chapter 1, is applicable to utility distribution lines that are eligible as project improvements, the policy is not applicable to the underground placement of these lines. Justification for underground placement need not be submitted to HUD.

The cost of underground placement of utility distribution lines is not eligible for inclusion in Gross Project Cost when special circumstances, such as adverse subsurface conditions or the limited extent of contemplated project improvements in the affected area, would make the cost exceptionally high in relation to the benefits to be derived.

Publicly Owned Utility

The full cost of relocating existing overhead lines underground, and the full cost of construction required to place new services underground are eligible as project costs. The eligible cost of the service lines themselves will be based, as appropriate, either on the "improvements of excess size or capacity" policy set forth in 7209.1, Site Preparation and Project Improvements, Chapter 1, or on policies applicable to the determination of relative benefit of supporting facilities. (See 7216.1, Local Grants-in-Aid, Chapter 2, Section 2.)

Privately Owned Utility

To the extent that a utility company may not legally be required (under applicable State statutes, local ordinances, judicial decisions, or provisions of the company's franchise) to relocate existing lines underground or to install new lines underground, Item 1 project costs may include compensation to the company for the actual cost of relocating existing lines underground or installing new lines underground.

(1) If the company may legally be required to relocate existing lines or install new lines underground, no part of the cost is eligible.

(2) If the company may legally be required to relocate existing lines or to install new lines at its own expense, but not to install the relocated or new lines underground, compensation not exceeding the cost of underground installation less the estimated cost of providing the same service with the same capacity through an overhead system is eligible.

(3) If the company may not legally be required to relocate existing lines or to install new lines underground, compensation for the full cost of relocating the existing lines or installing the new lines underground is eligible.

With the Part I Loan and Grant Application, the LPA shall submit a legal opinion establishing what the utility company may or may not legally be required to do at its own expense.

If the underground installation affects the character of privately owned street lighting standards to be installed, Item 1 project costs may include the actual cost of standards and fixtures installed, less the estimated cost of standards and fixtures which would have been provided under existing practice in the locality.

CERTIFICATE OF MAILING
AND SERVICE

I, PHILLIP M. BARBER, being first duly sworn, hereby certifies:

1. I am a member of the Bar of this Court, having been admitted thereto on the 18th day of April, 1977, and that I make the following affidavit from my own personal knowledge.

2. Pursuant to Rule 28.2, _____ copies of the Brief Amicus Curiae in support of Petitioner of the City of Boise, Idaho, and the Boise, Idaho, Redevelopment Agency and the motion of the Boise Redevelopment Agency for leave to join in the Brief Amicus Curiae has been deposited in the United States Post Office in Boise, Idaho, with first-class postage prepaid affixed, properly addressed to the Clerk of this Court, this 22nd day of July, 1982, within the time for filing the same, by your affiant.

3. Pursuant to Rule 28.3 three copies of the said document have been served upon each of the following persons by depositing the said three copies in the United States Post Office in Boise, Idaho, with first-class postage prepaid attached thereto, addressed to those persons, this 22nd day of July, 1982, by your affiant.

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____ day of July, 1982.

_____
Notary Public for Idaho
Residing at Boise, Idaho

No. 81-2332.

Office - Supreme Court, U.S.
FILED
JUN 22 1982
ALEXANDER L. STEVAS,
CLERK

In the Supreme Court of the United States.

OCTOBER TERM, 1982.

NORFOLK REDEVELOPMENT AND HOUSING AUTHORITY, A POLITICAL SUBDIVISION OF THE COMMONWEALTH OF VIRGINIA,
PETITIONER,
v.
THE CHESAPEAKE AND POTOMAC TELEPHONE COMPANY OF VIRGINIA,
RESPONDENT.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit.

Amicus Curiae Brief of the Boston Redevelopment Authority, a Political Subdivision of the Commonwealth of Massachusetts, in Support of the Petition for the Writ of Certiorari.

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TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES CITED..... (i)

PRELIMINARY STATEMENT..... 1

INTEREST OF THE BRA AS AMICUS CURIAE.... 2

SUMMARY OF ARGUMENT..... 9

ARGUMENT:

I. Public Utilities Are Not Within The Class of Persons to be Protected by the Uniform Relocation Act.....10

II. The Legislative History of the Uniform Relocation Act Supports Petitioner's Position that Relocation Benefits were not Intended to be Paid to Utilities.....15

III. By Contract, Utilities are Usually Required to Relocate their Facilities From One Public Street to Another Without Compensation.....22

CONCLUSION.....26

TABLE OF AUTHORITIES CITED

Page

Cases

Allied Structural Steel Co. v. Spannaus, 438 U.S. 234 (1978)..... 24

Artesian Water Co. v. State, Department of Highways & Transportation, 330 A.2d 432 (Sup. Ct. Del. 1974)..... 19

Boston Electric Light Co. v. Boston Terminal Co., 184 Mass. 566, 69 N.E. 346 (1904)..... 3

Chesapeake & Potomac Telephone Co. v. Landrieu, 647 F.2d 298 (4th Cir. 1982).....16, 22

Crowell v. Benson, 285 U.S. 22 (1932).. 24

Lynch v. United States, 292 U.S. 571 (1934)..... 24

New England Telephone & Telegraph Co. v. Boston Terminal Co., 182 Mass. 397, 65 N.E. 835 (1903)..... 3

Pacific Telephone & Telegraph Co. v. Redevelopment Agency, 87 Cal. App. 3d 296, 151 Cal. Rptr. 68 (Ct.App. 1978)..... 23

Southern California Gas Co. v. City of Los Angeles, 50 Cal.2d 713, 329 P.2d 289 (1958)..... 23

United States v. 3969.59 Acres of Land, 56 F. Supp. 831 (D. Idaho 1944)..... 12

United States Trust Co. v. New Jersey, 431 U.S. 1 (1977)..... 24

Statutes

Federal-Aid Highway Act of 1968, Pub. L. 90-495, 82 Stat. 815 (1968).. 16

Housing & Urban Development Act of 1968, Pub. L. No. 90-448, 82 Stat. 476 (1968)..... 16

Mass. Gen. Laws Ann. ch. 121B, §1 (West Supp. 1981)..... 2

Mass. Gen. Laws Ann. ch. 121B, §4 (West Supp. 1981)..... 1, 2

23 U.S.C. §123 (1976)..... 18

42 U.S.C. §§4601 et seq. (1976)..... 2

42 U.S.C. §4601(6) (1976)..... 11

42 U.S.C. §4621 (1976)..... 10

42 U.S.C. §4624 (1976)..... 12

42 U.S.C. §4652 (1976)..... 13

Legislative History

H.R. Rep. No. 1656, 92d Cong., 2d Sess., reprinted in [1970] U.S. Code Cong. & Ad. News 5850..... 11,17 19

Sen. Rep. No. 1407, 85th Cong., 2d Sess., reprinted in [1958] U.S. Code Cong. & Ad. News 2382..... 20

115 Cong. Rec. 31534 (1969).....17, 18

Uniform Relocation Act, uncodified §220, 84 Stat. 1903 (1971)..... 19

Miscellaneous

HUD Urban Renewal Handbook (RHA 7209.1)..... 4

Brief for Petitioner, NRHA v. Chesapeake and Potomac Tel. Co. of Va., 674 F.2d 298 (4th Cir. 1982), petition for cert. filed, 51 U.S.L.W. 3001 (U.S. June 22, 1982) (No. 81-2332)..... 4

Supreme Court Rule 36.4, 28 U.S.C..... 1

PRELIMINARY STATEMENT

The Boston Redevelopment Authority ("BRA") respectfully submits this brief as amicus curiae in support of the petition of the Norfolk Redevelopment and Housing Authority ("NRHA") for the issuance of a writ of certiorari to review the decision of the United States Court of Appeals for the Fourth Circuit.

This brief is submitted as a matter of right pursuant to Supreme Court Rule 36.4 since the BRA is a "public body politic and corporate" of the Commonwealth of Massachusetts (the "Commonwealth"), Mass. Gen. Laws Ann. ch. 121B, §4, (West Supp. 1981), and the issues involved in this case vitally affect redevelopment in the Commonwealth.

The BRA is charged with responsibilities very similar to those of NRHA and other housing and redevelopment authorities throughout the United States. As such, it is

responsible within the City of Boston for the acquisition, clearance and assembly of land and improvements within decadent, substandard and blighted open areas and for preventing the spread of blight and deterioration in such areas through the carrying out of urban renewal projects. Mass. Gen. Laws Ann. ch. 121B, §§1 and 4 (West Supp. 1981).

Since the passage of the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, 42 U.S.C. §§4601 et seq. (1976) (the "Uniform Relocation Act"), the BRA has undertaken a number of significant urban renewal projects in conjunction with the United States Department of Housing and Urban Development ("HUD") and with federal assistance has made Boston a model for urban revitalization.

INTEREST OF THE BRA AS AMICUS CURIAE

This case raises a question of such public interest that justice requires a final

determination by the Supreme Court of the United States. The BRA asserts its right to appear as amicus curiae in order to protect the common law rule in Massachusetts, and in other states, that in return for the right to install its facilities under public streets at no charge a public utility may be required to remove its facilities at its expense. Boston Electric Light Co. v. Boston Terminal Co., 184 Mass. 566, 69 N.E. 346 (1904); New England Telephone and Telegraph Co. v. Boston Terminal Co. 182 Mass. 397, 65 N.E. 835 (1903). This general rule is reflected in contracts with public utilities in the form of licenses granted by municipalities which by their terms require a utility to bear relocation costs. Such licenses are similar to the franchise agreement in the case at bar that provided that the public utility "was obligated, upon request of the City, to abandon or remove ...[distribution facilities] without charge." Brief for Petitioner

at 7, NRHA v. Chesapeake and Potomac Tel. Co. of Va., 674 F.2d 298 (4th Cir. 1982), petition for cert. filed, 51 U.S.L.W. 3001 (U.S. June 22, 1982) (No. 81-2332).

This common law and contractual right also was recognized by HUD prior to enactment of the Uniform Relocation Act in its manual of HUD policies whereby HUD disallowed relocation compensation to utility companies.

> Removal or relocation of utility lines owned by a private utility company will not be allowed as a project expenditure unless compensation to the company is required under applicable State statutes, judicial decisions, or preexisting local ordinances or provisions of the company's franchise.

HUD Urban Renewal Handbook (RHA 7209.1). This policy has remained unchanged.

In reliance upon this long standing practice, the BRA has entered into a number of financial settlements with HUD. Under the BRA's typical federal assistance, or "loan and grant", contract with HUD, relocation

costs are to be reimbursed by HUD. HUD's obligation to reimburse such costs is generally terminated by a final settlement agreement, approximately twenty of which have been made in connection with Boston projects. In each of these projects, no relocation costs have been paid to public utilities. It can now be anticipated that the BRA as well as a number of other redevelopment authorities throughout the Commonwealth and the United States will be requested to reimburse public utilities for relocation costs that were incurred by the utilities without expectation of public compensation and therefore included in the utilities' rate bases and paid by utility customers in the form of higher utility bills. It can be anticipated that such costs will be in the millions, and perhaps, billions of dollars.

The United States Court of Appeals for the Fourth Circuit ruled that the literal

language of the Uniform Relocation Act required relocation costs to be paid to public utilities as displaced persons. This ruling, the first of its kind, abrogates over a century of established doctrine that public utilities must relocate upon request by local governing bodies without compensation and contravenes Congressional intent, as expressed in the Uniform Relocation Act and other contemporary legislation, to leave this doctrine intact. It ignores state law and the terms of specific licenses and franchises under which public utilities consent to the relocation of services without compensation as a condition for doing business in a municipality. It treats as irrelevant the long standing policy of HUD to exclude such costs from relocation benefits on which redevelopment authorities have relied for the twelve years following the passage of the Uniform Relocation Act and on which the financial

integrity of redevelopment authorities depends.

The impact of the Fourth Circuit's decision upon the financial support for the BRA and upon future projects in the City of Boston is substantial. The practical result is to create a vast, unexpected windfall for public utilities. For projects already completed, utilities will look to the BRA in the first instance for reimbursement. The effect on redevelopment authorities will be crippling since no funds have been appropriated to cover such unanticipated claims, and the magnitude of such claims will likely exhaust existing funds and threaten the continuing vitality of redevelopment authorities. Consequently, both present and past redevelopment efforts will be placed in jeopardy. In addition, should such claims be made, the very basis for final settlements with HUD will be undermined. The BRA as well

as other redevelopment authorities will, by necessity, seek reimbursement from HUD. Whether local redevelopment authorities or HUD pays, there will be significantly less money available for additional redevelopment, and the net effect will be severely to retard the revitalization of the cities of this country. Already, on the basis of the Fourth Circuit's decision, public utilities are refusing to proceed with relocation of services unless paid relocation costs.

SUMMARY OF ARGUMENT

Utility companies occupying public property free of charge are not within the class of persons intended to be protected by the Uniform Relocation Act. The language and legislative history of the Uniform Relocation Act support petitioner's position that relocation benefits were not intended to be paid to utilities. Congress enacted the Uniform Relocation Act with the federal highway and federal urban renewal programs in mind and with an intention to create a uniform system. Neither of these systems created a right to compensation under federal law for utility companies. Thus, Congress must not have intended to extend relocation compensation to utility companies under the Uniform Relocation Act.

The relationship between utility companies occupying public land free of charge and municipalities is a special contractual

one pursuant to which utility companies agree to remove or abandon their facilities without compensation. Absent a clear statement of Congressional intent to the contrary, it is improper to construe the Act as altering such established relationships without creating constitutional infirmities.

ARGUMENT

I. PUBLIC UTILITIES ARE NOT WITHIN THE CLASS OF PERSONS TO BE PROTECTED BY THE UNIFORM RELOCATION ACT.

Public utilities are not within the class of persons whom Congress sought to protect in the Uniform Relocation Act. The Act establishes:

> a uniform policy for the fair and equitable treatment of persons displaced as a result of Federal and federally assisted programs in order that such persons shall not suffer disproportionate injuries as a result of programs designed for the benefit of the public as a whole.

42 U.S.C. §4621 (1976) (emphasis added).

The Uniform Relocation Act by its literal terms applies only to a person who

"moves from real property or moves his personal property from real property as a result of the acquisition of such real property" 42 U.S.C. §4601(6) (1976). The purpose of such relocation benefits is set forth in the legislative history as providing benefits for persons previously inadequately compensated by eminent domain:

> As the thrust of Federal and federally assisted programs have shifted from rural to urban situations, it became increasingly apparent that the application of traditional concepts of valuation and eminent domain resulted in inequitable treatment for large numbers of people displaced by public action. When applied to densely populated urban areas with already limited housing, the result can be catastrophic for those whose houses or businesses must give way to public needs. The result has too often been that a few citizens have been called upon to bear the burden of meeting public needs.

H.R. Rep. No. 1656, 91st Cong., 2d Sess.2, reprinted in [1970], U.S. Code Cong. & Admin. News 5850, 5851.

It was therefore to fill the gap of traditional compensation under eminent domain, which compensates an owner only for the value of the taken property, United States v. 3969.59 Acres of Land, 56 F.Supp. 831 (D. Idaho 1944), that Congress provided for the additional benefits in the Uniform Relocation Act. Those benefits apply only to persons subject to eminent domain and to other persons, such as tenants, explicitly provided for by the Act. See, e.g., 42 U.S.C. §4624 (1976). Public utilities, which have no right to compensation under eminent domain by virtue of the common law rule and their contractual undertakings, can not be within the class of persons protected by the Uniform Relocation Act.

Nevertheless, the Fourth Circuit concluded that a public utility comes within the literal language of the Uniform Relocation Act because it "move[d]...personal property

from real property." This literal reading of the Act in fact involves a logical leap. Public utilities typically do not move their existing lines; rather, new service lines are installed in other locations. Thus, public utilities are entitled to compensation only under the acquisition provision of the Uniform Relocation Act, 42 U.S.C. §4652 (1976), to the extent their property is subject to principles of eminent domain. A public utility was never intended to recover for costs that it was otherwise not entitled to under an eminent domain taking.

Such a distinction is a most logical one in view of the economics of utility company operations and their relationship with cities and towns and their consumers. Most utilities, like the Chesapeake and Potomac Telephone Company of Virginia, pay nothing to cities and towns for the right to use public

streets and other property and agree to abandon or remove them without charge. Utility companies are required to offer services to the public, they enjoy the benefit of licenses or easements free of charge, and they agree to remove their facilities also without charge. Congress recognized these peculiarities and quite logically viewed utilities as not really displaced in the more common sense of, for example, an occupant of a dwelling unit or storekeeper. Such persons pay for the right to occupy and are commonly forced to relocate as a result of federal projects. Utilities do not pay for such rights and indeed usually are provided with alternative means and locations, in the form of new licenses, for providing their services. Utilities typically work closely with redevelopment authorities in the development of renewal projects;

they often provide new facilities and services as part of the redevelopment; they frequently acquire rights to install modernized facilities on new land acquired at federal expense; and indeed they often are a real beneficiary of any redevelopment. Any relocation and construction or installation cost to the utilities is then passed on to consumers through rates charged for the services.

A public utility does not suffer any real, let alone a disproportionate, injury. Under such circumstances, it would be incongruous to hold that a public utility should benefit from the Uniform Relocation Act at the considerable expense of the public.

II. THE LEGISLATIVE HISTORY OF THE UNIFORM RELOCATION ACT SUPPORTS PETITIONER'S POSITION THAT RELOCATION BENEFITS WERE NOT INTENDED TO BE PAID TO UTILITIES.

The Court of Appeals placed great weight on the "absence of any clear legislative

intent to exclude utilities", Chesapeake and Potomac Telephone Company of Virginia v. Landrieu, 674 F.2d 298, 301 (4th Cir. 1982), and relied in addition on Congress' failure to mention utilities and on its purported intent "to extend benefits uniformly to persons who are displaced by federal acquisitions." Id. To the contrary, however, the legislative history of and policy behind the Uniform Relocation Act indicate that utilities were not intended to be paid relocation benefits under the Act.

The legislative history of the Uniform Relocation Act demonstrates that Congress intended to extend a system of relocation assistance then being used under the Federal-Aid Highway Act of 1968, Pub. L. No. 90-495, §30, 82 Stat. 815, 830-834 (1968) (repealed 1971) and under the Housing and Urban Development Act of 1968, Pub. L. No. 90-448, 82 Stat. 476, 526 (1968) (repealed 1971) to all

other federal agencies. For example, in passing the Uniform Relocation Act, Congress explicitly recognized the Federal-Aid Highway Act of 1968 as a "major precedent". H.R. Rep. No. 1656, 91st Cong., 2d Sess. 2, reprinted in [1970] U.S. Code Cong. & Ad. News 5850, 5851. In addition, Senator Muskie, the sponsor of the bill which became the Uniform Relocation Act, stated on the Senate floor:

> The problems created by the impact of such acquisitions have long been one of the Nation's top domestic burdens....Much of this problem will be covered by the present relocation and acquisition programs of HUD and the new programs authorized under the Highway Act of 1968. Yet, many other agencies and programs still lack consistency as well as identity with requirements of these programs.

115 Cong. Rec. 31534 (1969). Senator Mundt added the following remarks:

> The effort to provide additional compensation was recognized by Congress when it approved the urban renewal legislation and more recently in the Highway Act of 1968. Our bill seeks to carry the

> benefit of these two statutes to all Federal and federally assisted land acquisition to provide uniformity of policy so badly needed in this area.

115 Cong. Rec. 31534. (1969).

Thus, Congress modeled the Uniform Relocation Act on the programs of relocation benefits being used on federal highway projects and HUD projects as of 1970 which did not require payment of relocation benefits to utilities.

In unequivocal fashion, HUD's policy, quoted at p. 4 supra, has prohibited reimbursement of utility relocation costs except where required by state law or other applicable contractual or legal requirements. Nor does the benefit program under the Federal-Aid Highway Act of 1968 require relocation compensation for utilities but rather allows for reimbursement only where mandated by state laws. 23 U.S.C. §123 (1976).

In addition, one of the stated purposes of the Uniform Relocation Act was the achievement of a uniform policy for relocation assistance and real property acquisition. H.R. Rep. No. 1656, 91st Cong., 2nd Sess. 3, reprinted in [1970] U.S. Code Cong. & Ad. News 5850, 5851. It is significant, therefore, that Congress has not repealed the Federal-Aid Highway Act utilities relocation provision. See Uniform Relocation Act, uncodified §220, 84 Stat. 1903 (1971); Artesian Water Co. v. State, Department of Highways and Transportation, 330 A.2d 432 (Super. Ct. 1974), modified, 330 A.2d 441 (Del.).

Part of the legislative history of the Federal-Aid Highway Act of 1958 is particularly on point in this regard. At that time Congress considered "whether Federal-aid [highway] funds should be used to participate in the cost of relocating utility facilities where no vested property right is taken,"

Sen. Rep. No. 1407, 85th Cong., 2d Sess. 27-28, reprinted in [1958] U.S. Code Cong. & Ad. News 2382, 2382, and the impact of the Federal-Aid Highway Act of 1956 which authorized a federal share of up to 95 percent of the cost of relocating utility facilities. Many states responded by enacting statutes providing for payment of such costs. In adopting a provision limiting the federal share to 70 percent of relocation costs that the state is obligated to pay, the committee report stated:

> The committee did not contemplate this drastic change in existing practice when the 1956 act was enacted, and realizes that the use of Federal funds for reimbursement to the States for this purpose will increase substantially, thereby reducing the amount of Federal funds available for construction of highways.

Id. at 2382-2383. Congress thus specifically recognized the long standing common law practice of states not compensating utilities, the special nature of relationships

between utilities and governmental utilities and the impact of changing the system of compensation.

Since the Federal-Aid Highway Act does not create a right to relocation benefits for utility companies, to maintain the desired uniformity, Congress must have intended that the Uniform Relocation Act also would not create such a right and that utilities displaced by all federal projects be treated similarly. The consequences of the Fourth Circuit's decision is the case at bar, insofar as it affects all federal projects and not just highway projects, far outweigh those feared by Congress in 1958.

In summary, Congress enacted the Uniform Relocation Act with two systems of relocation benefits in mind. Neither of these systems created a right to compensation under federal law for utility companies. Thus, the only reasonable conclusion from the legislative

history is that Congress did not intend to extend relocation compensation to utility companies by enacting the Uniform Relocation Act.

III. BY CONTRACT, UTILITIES ARE USUALLY REQUIRED TO RELOCATE THEIR FACILITIES FROM ONE PUBLIC STREET TO ANOTHER WITHOUT COMPENSATION.

The Fourth Circuit based its decision in part upon a holding that nothing in the legislative history of the Uniform Relocation Act indicates that Congress did not intend utilities to be treated as displaced persons eligible to receive relocation benefits or that the Act was not intended to create rights not recognized at common law. 674 F.2d at 300-301. In so holding, the Court ignored the fact that the relationship between a licensor-municipality and licensee-utility is generally in the nature of a contract under which the utility is responsible for all costs of relocating utility lines placed under public highways.

The granting to a public utility of the right to lay utility lines under public streets has generally been held to be subject to an implied obligation that the utility relocate its facilities at its own expense when necessary to make way for a proper governmental use of the street. Pacific Telephone and Telegraph Co. v. Redevelopment Agency, 87 Cal. App. 3d 296, 299, 151 Cal. Rptr. 68, 69 (Ct. App. 1978); Southern California Gas. Co. v. City of Los Angeles, 50 Cal. 2d 713, 716, 329 P.2d 289, 290 (1958). In many instances, this obligation is expressly set forth in the franchise itself.

Thus, contrary to the statement made by the Fourth Circuit that the situation of a public utility is like that of a tenant at will, the situation of a public utility is sui generis since the utility has an affirmative contractual obligation at common

law to pay the cost of relocating its utility lines that are located under public streets. As a matter of simple contract law, this obligation of a utility to the franchisor municipality continues in effect notwithstanding the provisions of the Uniform Relocation Act.[1] Absent a clear statement of Congressional intent to the contrary, it is

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1. Such an interpretation would violate the fundamental rule of statutory interpretation that wherever possible an interpretation that raises questions of Constitutional invalidity should be avoided. Crowell v. Benson, 285 U.S. 22 (1932). To interpret the Uniform Relocation Act as retroactively impairing the contractual relationships of thousands of municipalities and utilities would raise serious questions under the Contract Clause of the U.S. Constitution, see, e.g., Allied Structural Steel Co. v. Spannaus, 438 U.S. 234 (1978); United States Trust Co. v. New Jersey, 431 U.S. 1 (1977), as applied to the federal government by the Due Process Clause of the Fifth Amendment, Lynch v. United States, 292 U.S. 571 (1934).

improper to construe the Act as altering such established relationships.

The decision of the Fourth Circuit, if unaltered or not remanded for further consideration of the contractual issue, thus shatters a bedrock principle of municipal law as well as impairs fundamental contractual rights between municipalities and public utilities. It does so at the risk of grave economic harm to urban redevelopment.

CONCLUSION

For all the foregoing reasons, the Writ of Certiorari should be issued.

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Dated: July 22, 1982

Docket No. 81-2332

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

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CLERK

NORFOLK REDEVELOPMENT AND HOUSING AUTHORITY, a political subdivision of The Commonwealth of Virginia,

Petitioner,

vs.

THE CHESAPEAKE AND POTOMAC TELEPHONE COMPANY OF VIRGINIA,

Respondent.

BRIEF AMICUS CURIAE IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

on behalf of

The Community Redevelopment Agencies of the City of Los Angeles, The City of Long Beach, The City of Oceanside, The City of Anaheim, The City of Victorville, The City of Culver City, The City of Santa Ana, The City of Garden Grove, and The City of San Jose, California

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SUBJECT INDEX

	PAGE
INTEREST OF THE AMICI CURIAE	1
STATEMENT OF THE CASE	4
ARGUMENT	6
I. CONFLICT BETWEEN CASES	7
II. PUBLIC IMPORTANCE	14
CONCLUSION	17

TABLE OF AUTHORITIES CITED

CASES

	PAGE
Appalachian Power Co. v. City of Huntington, 210 N.E. 2d 471 (W.Va.1974)	9
Artesian Water Co. v. State Dept. of Hwys. & Transp., 330 A.2d 432 (Del. Super.1974)	9
Bristol Tenn. Housing Auth. v. Bristol Gas Co., 407 S.W.2d 681 (Tenn. 1966)	9
Consumer Power Co. v. Costle, 615 F.2d 1147 (USCA 6th, 1980)	9
Cort v. Ash, 422 U.S. 66 (1975)	10
Dept. of Transp. & Development of Louisiana v. Beaird-Poulan, Inc., cert.denied, 449 U.S. 971 (1980)	12,13
Middlesex Co. Sewage Auth. v. National Sea Clammers Ass'n., 451 U.S. _____, 101 S.Ct. 26, 15, 69 L.Ed.2d 435 (1981)	11
Mountain States Tel. & Tel. Co. v. Boise Redevelopment Agency (9 Ida. Dist. Ct. 10/17/80)	9
New Orleans Gaslight Co. v. Drainage Comm. of New Orleans, 197 U.S. 453 (1905)	7

PAGE

Pacific Tel. & Tel. Co. v. City and County of San Francisco, 197 Cal.App. 2d 133, 17 Cal.Rptr. 687 (1961) 5

Pacific Tel. & Tel. Co. v. Redevelopment Agency of Glendale, 87 Cal.App.3d 296, 151 Cal.Rptr. 68 (1978) 8

Pacific Tel. & Tel. Co. v. Redevelopment Agency of the City of Redlands, 75 Cal.App. 3d 957, 142 Cal.Rptr. 584 (1977) 8

So. Union Gas Co. v. City of Artesia, 472 P.2d 368 (N.M., 1970) 9

State of California v. Sierra Club, 451 U.S. 287 (1981) 11

Texas Industries, Inc. v. Radcliffe Materials, Inc., 451 U.S. 630 (1981) 11

Touche Ross & Co. v. Reddington, 442 U.S. 560 (1979) 10

Transamerica Mortg. Advisors, Inc. v. Lewis, 444 U.S. 11 (1979) 11

PAGE

Statutes

California Constitution, Art. XIIIA 15

California Health and Safety Code §§ 33000 et seq. 1

California Health and Safety Code, §§ 33670 et seq. 15

California Pub. Utilities Code, § 7901 5

Uniform Relocation Act, 42 U.S.C. 4601 et seq. 2

Uniform Relocation Act, 42 U.S.C. 4627 11

Uniform Relocation Act, 42 U.S.C. 4630 12

28 U.S.C. 1331 6

Miscellaneous

Note, Implied Rights of Action in Federal Legislation: Harmonization Within the Statutory Scheme, 1980 Duke L.J. 928 10

INTEREST OF THE AMICI CURIAE

The California Redevelopment Agencies, political subdivisions of the State of California, respectfully submit this brief pursuant to Rule 42 of the Rules of this Court.

The represented redevelopment agencies are separate governmental entities existing pursuant to California Health & Safety Code §§ 33000, et seq. having their own law officers and exercising sovereign powers of the State. The amici curiae are, therefore, political subdivisions of the State of California. In each case, counsel for said entities acts either as general or special counsel for redevelopment matters.

These entities and their legal officers are concerned about and deeply affected by, the decision of the Fourth Circuit Court of Appeals.

That court's failure to consider the nature of the federal Uniform Relocation Act (42 U.S.C. § 4601 et. seq., hereinafter "URA"), and its blanket determination that relocation assistance must be paid to public utilities, not only conflicts with several state and federal court decisions to the contrary, but also has the effect of interpreting the laws of the various states (which are patterned after the URA) so as to require such assistance even when no federal assistance is involved. This is estimated to result in an increase in costs of desperately needed redevelopment projects in an amount exceeding 20%.

At the same time, the public utilities (at least in California) pay nothing for the right to place their lines in public rights of way, and are protected from competition by the States. To alter the long-standing rule that public utilities are not entitled to relocation

benefits unless statute requires otherwise would cause redevelopment agencies and other State and local governments to give away not only the public right of way but also the cost of relocating the utility lines any time a project requires the utility to move them.

This dramatic shift of the economic burden from the utility rate-payer (who ought to pay for the cost of bringing the service to him, but who was not obliged to pay for the right-of-way) will impose that burden, not on the general taxpayer, but upon the poor and other people served by redevelopment agencies in California. In this State, governmental agencies which rely on the property tax, (including redevelopment agencies), cannot increase that tax so as to force the general taxpayer to bear the utilities' burden. Thus, in order to pay the utilities, governmental services must be reduced, and

low income housing, blighted residence rehabilitation and other projects will inevitably suffer.

The represented agencies submit this brief in their own interests and in the interests of the people they serve.

STATEMENT OF THE CASE

The facts may be briefly summarized. The Norfolk Redevelopment and Housing Authority (NRHA), a political subdivision of the State of Virginia, acquired certain property in order to redevelop it. In doing so, it was assisted with federal funds. Upon acquiring property adjacent to various streets, NRHA requested that the City of Norfolk, a separate governmental entity and not a party hereto, vacate some of those streets so that redevelopment could proceed. The City complied.

Pursuant to a franchise agreement entered into between the predecessor of

the Respondent (C & P) and the City, C & P had obtained the use of the streets free of charge, but with the further agreement that C & P would, when required for public purposes, remove its facilities without charge. (In California, the right is given by statute and the agreement to remove is implied. See California Public Utilities Code § 7901 and Pacific Tel. & Tel. Co. v. City and County of San Francisco 197 Cal.App.2d 133, 17 Cal.Rptr. 687 (1961).

C & P complied with the request of the City, but then filed a claim with the State Agency. The State Agency denied the claim, and HUD concurred.

C & P now seeks to avoid its prior agreement by asserting that the federal URA gives it a new and federal cause of action for the payment of its relocation costs. It apparently urges that, because the State of Virginia adopted enabling statutes to apply the URA to localities,

and because federal assistance is involved, the utility's prior commitment may be ignored.

NHRA has the sole responsibility of paying whatever relocation benefits are required by law.

Neither the District Court nor the Court of Appeal directly considered the question of jurisdiction, but it is assumed that C & P brings this action pursuant to 28 USC § 1331.

ARGUMENT

It is the position of these Amici Curiae that the Petition for Certiorari in this case should be granted because of (1) the conflict in the cases, both Federal and State and (2) the public importance of this decision. These Amici Curiae believe that:

A. The 4th Circuit Court of Appeal incorrectly interpreted the Uniform Relocation Act (URA);

B. There is no evidence that Congress intended to confer a Federal cause of action to review the determination of a State Agency when there is State Court jurisdiction.

C. The opinion of the 4th Circuit, if permitted to stand, will provide a windfall to utilities at the expense of the underpriviledged and will effectively disrupt the regulation of public utilities by the States.

I.

CONFLICT BETWEEN CASES

Apparently because the utilities stand to gain so much from relocation support, this issue has been the constant subject of litigation for nearly a century. (See New Orleans Gaslight Co. v. Drainage Comm. of New Orleans 197 U.S. 453 (1905) for an early version of this controversy).

Virtually without exception, it has been held that under the common law, the public utility must pay for relocation of its facilities under circumstances such as this unless specific statutory authority is found to the contrary. The cases supporting this view have never taken the position that the broad term "all businesses" automatically means that there is an exception from the common law rule (see e.g. Pacific Tel. & Tel. v. Redevelopment Agency of Glendale 87 Cal.App.3d 296, 151 Cal.Rptr. 68 (1978) and Pacific Tel. & Tel. v. Redevelopment Agency of the City of Redlands 75 Cal.App.3d 957, 142 Cal.Rptr. 584 (1977), hrg. den.).

The Courts' unwillingess to imply such an exception is supported by the long-standing rule that in order to alter common law, explicit and specific statutory language must be used.

Other cases rejecting the public utilities' contentions include Consumer Power Co. v. Costle 615 F.2d 1147 (USCA 6th, 1980) and Mountain States Tel. & Tel. Co. v. Boise Redevelopment Agency (9 Ida. Dist. Ct. 10/27/80). See also: Appalachian Power Co. v. City of Huntington 210 S.E.2d 471 (W.Va., 1974); So. Union Gas Co. v. City of Artesia 472 P.2d 368 (N.M., 1970); Bristol Tennessee Housing Auth. v. Bristol Gas Co. 407 S.W.2d 681 (Tenn., 1966); Artesian Water Co. v. State Dept. of Hwys. & Transp. 330 A.2d 432 (Del. Super., 1974).

In stark contrast to these cases is the 4th Circuit opinion in this case. The opinion implies that no inquiry into legislative history or other statutes should be made, thus effectively casting doubt on all of the States cases engaging in such inquiry in order to interpret their statues which are similar to the Federal

URA. The effect of the 4th Circuit opinion will be to effectively undermine years of settled law in the States.

The 4th Circuit opinion creates another sort of conflict as well. This Court has had occasion recently to consider several circumstances in which the jurisdiction of the Federal courts was at issue.

Recent decisions of this Court manifest an undeniable trend to restrict the availability of implied causes of action under federal statutes. (See Note, Implied Rights of Action in Federal Legislation: Harmonization Within the Statutory Scheme, 1980 Duke L.J. 928). In Touche Ross & Co. v. Reddington, 442 U.S. 560, (1979), this Court modified the application of the four-factor test announced in Cort v. Ash, 422 U.S. 66 (1975), by announcing that the task of a federal court in implied cause of action

cases was solely to determine whether Congress intended to create the private right being asserted.

The Court has since reiterated this emphasis on Legislative intent. See, e.g., Middlesex County Sewerage Authority v. National Sea Clammers Association 451 U.S. _____, 101 S. Ct. 2615, 69 L.Ed. 2d 435 (1981); Texas Industries, Inc. v. Radcliffe Materials, Inc., 451 U.S. 630 (1981); State of California v. Sierra Club, 451 U.S. 287 (1981); Transamerica Mortg. Advisors, Inc. v. Lewis 444 U.S. 11, (1979).

Here, we are concerned with the applicability of federal legislation to a relocation assistance decision of a State Agency under State law as part of a federally assisted project. The only substantive provisions of the URA which deal with such State determinations are carefully treated in 42 U.S.C. §§ 4627 and

4630, which forbid the head of a federal agency from approving grants or other assistance to a State agency ". . .unless he receives satisfactory assurances from such State agency. . ." that fair and reasonable relocation payments and assistance shall be provided to or for displaced persons, as are required to be provided by a federal agency under other sections of the Act. (See, Department of Transportation and Development of Lousiana v. Beaird-Poulan, Inc., cert. denied, (per Justice Rehnquist dissenting), 449 U.S. 971 (1980).

Thus, Congress chose to encourage the States to make appropriate relocation assistance payments under their own laws by conditioning the availability of federal funds upon the provision of such payments.

> "The carrot of federal funds, not the stick of private suits, was

chosen by Congress as the means of providing relocation payments to those displaced by the States for federally assisted projects." Ibid.

Under such a statutory scheme, where Congress neither explicitly nor implicitly gave to the federal courts the power to review such State determinations, the implication of such power is unwarranted and unnecessary. HUD itself has indicated that its interpretation involves a State determination of the eligibility of public utilities for relocation assistance.

That is, the Congressional concern manifested by the applicable provisions of the Act was not that private parties allegedly aggrieved as a result of a State determination be permitted to take that grievance to federal court for resolution, but rather that the States assure the appropriate federal agency that relocation

procedures will be followed. Once the federal government has accepted those assurances, what remains is the implementation of State law by a State agency. The proper forum for resolving disputes arising thereunder is the appropriate State court. Congress did not create, nor did it intend to create, any remedy other than that available in the State courts. The Court of Appeals, by entertaining jurisdiction and construing the federal statute as creating such a private remedy, has decided in conflict with this intent, and the decisions of this Court restricting the availability of implied federal causes of action.

II.

PUBLIC IMPORTANCE

The vital importance of this case to communities throughout the country cannot be overestimated and is reflected in the

other amicus curiae briefs on this subject.

In California, the potential is even more serious than in other States. Virtually the only State-authorized source of redevelopment funds is the property tax (see California Health & Safety Code §§ 33670 et seq.). Because the California Constitution places a limit on the amount of property tax (Cal.Const. Art. XIII A; "Prop. 13"), the burden which the utilities seek to impose upon redevelopment agencies cannot be passed on to the general taxpayer. Redevelopment agencies will be obliged to cut their services.

Because the cost of relocating utilities will result in an estimated 20-30% of the total cost of a project, the redevelopment agencies' housing, rehabilitation and other programs will be cut by that amount. The effect is to place

the burden on the poor. It is they who will not receive housing or rehabilitation loans and it is they who will not receive the benefit of a redevelopment agency's other programs. At the same time, the utility rate payers will be relieved of part of the cost bringing the service to them.

Under the present system, the State protects the utility from competition, sets its rates and allows it to use public rights of way without charge. But the 4th Circuit opinion effectively replaces a portion of such regulation with some automatic interpretation of the URA. There is no discretion permitted by the 4th Circuit opinion, only payment. As shown in the other briefs submitted in support of the Petition, this result was not intended by Congress and obviously disrupts coordinated State regulation of public utilities.

CONCLUSION

The 4th Circuit opinion will cause disruption of the States' regulation of their public utilities. It will place the burden of utilities' relocation on California's poor. The opinion will open the doors of the Federal courts to reviews of State agencies and will involve Federal courts in questions which Congress never intended to be subject to their jurisdiction. The opinion is an incorrect interpretation of the URA and dramatically affects State powers and the Federal Courts.

For all of these reasons, this amicus curiae respectfully requests that this Court grant the Petition for Writ of Certiorari.

Respectfully submitted,

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No. 81-2332

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In the Supreme Court of the United States

October Term, 1982

NORFOLK REDEVELOPMENT AND HOUSING AUTHORITY,
a political subdivision of the Commonwealth of Virginia,
Petitioner,

v.

THE CHESAPEAKE AND POTOMAC
TELEPHONE COMPANY OF VIRGINIA,
Respondent.

BRIEF OF THE AMICUS CURIAE, THE CITY OF NORFOLK, VIRGINIA, IN SUPPORT OF THE PETITIONER'S PETITION FOR A WRIT OF CERTIORARI

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTION PRESENTED

Whether Congress, in passing the Uniform Relocation Act of 1970, intended to completely abrogate the universal common law rule that utilities bear the expense of relocating their facilities from public rights-of-way, thus placing a heavy financial burden on already beleaguered cities by including utility companies within the broad definition of "displaced persons" entitled to receive relocation expenses, despite the total lack of any indication of congressional intent to make such a drastic change.

TABLE OF CONTENTS

	PAGE
Interest of the amicus curiae . .	1
Statement of the case	3
Reasons for granting the writ . .	5
Conclusion.	17
Appendix A.	A-1
Appendix B.	B-1

TABLE OF AUTHORITIES

Cases

	Page
Alexander v. HUD, 441 U.S. 39, 60 L.Ed.2d 28, 99 S.Ct. 1572 (1979)	7, 11
Chesapeake & Potomac Telephone Co. v. Landrieu et al., No. 79-906-N (U.S.D.C., E.D. Va., June 4, 1981) (Appendix B) . .	5, 8, 9, 12
Chesapeake & Potomac Telephone Co. v. Landrieu et al., No. 81-1602 (U.S.Ct.App., 4th Cir., March 25, 1982) (Appendix A). .	5
Consumers Power Co. v. Costle, 615 F.2d 1147 (6th Cir. 1980), aff'g 468 F.Supp. 375 (E.D. Mich. 1979)	14
Lone Star Gas Co. et al. v. Landrieu, No. 80-100-C (U.S. D.C., E.D. Okla., March 30, 1981)	14
Mountain States Telephone & Telegraph Co. et al. v. Boise Redevelopment Agency, No. 52891 (D.C. 4th Jud. D. Idaho, October 27, 1980), on remand from, 101 Idaho 30, 607 P.2d 1084 (1980)	14
Pacific Telephone & Telegraph Co. v. Redevelopment Agency, 151 Cal.Rptr. 68, 87 Cal. App.3d 296 (1978)	8, 14

Page

Public Service Co. v. Harris, No. 79-C-37-3T (U.S.D.C., N.D. Okla., August 22, 1980) . . 14

Statutes

Code of Virginia, 1950, as amended, §§ 25-235 et seq. . . 4

District of Columbia Public Utilities Reimbursement Act of 1972, Pub.L.No. 92-495 . . . 11

Federal Aid to Highways Act of 1958, 23 U.S.C. § 123 11

Uniform Relocation Assistance and Real Property Policies Act, 42 U.S.C. §§ 4061 et seq. 4

Rules

Rules of the United States Supreme Court

Rule 36.4 2

Reports

House Report No. 91-1656, reported in 1970 U.S. Code Cong. & Adminis. News at 5850-5852 12

Page

Regulations

Urban Renewal Handbook RHA
§ 7209.1 13

No. 81-2332

IN THE
Supreme Court of the United States
OCTOBER TERM, 1982

NORFOLK REDEVELOPMENT AND HOUSING AUTHORITY, a political subdivision of the Commonwealth of Virginia,
Petitioner,

v.

THE CHESAPEAKE AND POTOMAC TELEPHONE COMPANY OF VIRGINIA,
Respondent.

BRIEF OF THE AMICUS CURIAE, THE CITY OF NORFOLK, VIRGINIA, IN SUPPORT OF THE PETITIONER'S PETITION FOR A WRIT OF CERTIORARI

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

INTEREST OF THE AMICUS CURIAE

This brief is filed on behalf of the City of Norfolk, Virginia, by its duly authorized legal officer pursuant

to Rule 36.4 of this Court. Petitioner, the Norfolk Redevelopment and Housing Authority [NRHA], has undertaken numerous federal- and city-financed urban renewal projects in Norfolk. The decision below that NRHA must pay Respondent Chesapeake and Potomac Telephone Company [C & P] for relocation costs that may reach a million dollars with interest for removing its facilities from streets affects the city directly. Although NRHA is a political subdivision of the Commonwealth of Virginia, independent of the city, any liability NRHA incurs ultimately will be borne by the city.[1] Even if NRHA paid the judgment itself, it would do so from money otherwise available for redevelopment projects in Norfolk.

---

[1]The Department of Housing and Urban Development [HUD] is no longer a party herein because its funds for the projects have long since been expended.

Norfolk has been a showcase for urban renewal projects. From a decaying Southern port city, unable to adjust to the burgeoning presence of the Navy following World War II, it has been rebuilt into a model for what federal funds, a committed citizenry, and local business initiative can achieve. Payment of this judgment, as well as of potential retroactive claims for all utility dislocations since 1970, could do much to stymie this remarkable progress as well as that of numerous other cities reborn with federal funds. Those funds, already sharply curtailed by recent budget cuts, will be further depleted, to the detriment of cities nationwide, by any unexpected obligation to repay the enormous costs of moving utility facilities from streets.

STATEMENT OF THE CASE

Appellant C & P sued NRHA and the

Secretary of HUD in the United States District Court for the Eastern District of Virginia for relocation costs under the Uniform Relocation Assistance and Real Property Acquisitions Policies Act [URA], 42 U.S.C. §§ 4061 et seq., and the corresponding Virginia act, Va. Code Ann. §§ 25-235 et seq. C & P claimed it was a "displaced person" under the URA, entitled to reimbursement for the cost of moving its underground telephone lines and equipment, at the city's request, for closing or improving streets in areas acquired for NRHA projects. C & P's franchise with Norfolk, however, provided that C & P would pay for relocating its facilities at the city's request. Although neither C & P nor any other utility company had ever asked reimbursement in Virginia under the URA before the instant suit, the city is aware of

numerous claims brought since the Fourth Circuit's opinion four months ago.

C & P's claim was made first to NRHA, reviewed, and denied. After that denial was upheld by HUD's area office, C & P filed suit in District Court. That court found no liability under the URA and denied all C & P's claims in a June 4, 1981, Memorandum Opinion. (Appendix B.) C & P appealed to the Fourth Circuit, which reversed the lower court on March 25, 1982, declaring C & P a "displaced person" entitled to relocation benefits under the URA. (Appendix A.) The City of Norfolk asks this Court to grant NRHA's petition for certiorari to review that opinion.

REASONS FOR GRANTING THE WRIT

This Court should review the appellate decision because it concerns an important federal question, not yet

decided by this Court, on the scope of reimbursement under the umbrella statute, URA; is based on a completely erroneous statutory interpretation that reads the URA as acting in total derogation of the common law, despite the lack of any indication of congressional intent to do so; is contrary to decisions by every state and federal court that has considered the issue, creating a conflict between the Fourth and Sixth Circuits; and will have a devastating, nationwide economic impact on cities if allowed to stand.

The issue presented, not yet resolved by this Court, deals with an important federal statute. The reach of the URA is very broad: it governs reimbursement to those displaced by almost all federally run or funded projects except for highways. This Court has examined it only a few times, most

recently in Alexander v. HUD, 441 U.S. 39 (1979), which makes clear that the Act is not intended to reimburse everyone displaced in any manner by a federally assisted program. The potential claims of utility companies under the Act since 1970 could reach billions of dollars.

The Fourth Circuit's opinion ignored a classic rule of statutory construction and thereby completely overturned the common law. The common law in Virginia and almost all states is that utility companies are not reimbursed for removing their facilities from public streets upon request of the city because they have no property rights in public rights-of-way. The city grants them the right to place their facilities in public streets on condition that they relocate those facilities at the city's

request.[2] C & P's 1898 franchise agreement with Norfolk, under which its telephone lines and other equipment were installed, is consistent with the common law in obliging C & P, on request, to move its facilities at its own cost. As stated by the California Court of Appeals:

> . . .[I]n the absence of a provision to the contrary, it has generally been held that a public utility accepts franchise rights in public streets subject to an implied obligation to relocate its facilities therein at its own expense when necessary to make way for a proper governmental use of the streets.

Pacific Telephone & Telegraph Co. v. Redevelopment Agency, 151 Cal. Rptr. 68, 69, 87 Cal. App. 3d 296 (1978). Accord, Chesapeake & Potomac, supra.

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[2] Chesapeake & Potomac Telephone Co. v. Landrieu et al., No. 79-906-N (U.S. D.C., E.D. Va., June 4, 1981) & cases cited therein. (Appendix B.)

The classic rule of construction is that a statute will not be interpreted to act in complete derogation of the common law, absent a clear indication of legislative intent to do so. Ignoring that rule, the Fourth Circuit gave a literal reading to the Act's broad definition of "displaced persons" as including utilities because it found no indication one way or the other of whether Congress intended to include them. In contrast, the District Court correctly construed the statute, id.:

> In the adoption of the Uniform Relocation Act of 1970, if Congress chose to abrogate such a well known common law principle, it would certainly have included in that legislation a clear affirmative statement of that revocation. Instead, no such reversal of the common law concept appears in the language of the Act or in its legislative notes and history.

The error of the Fourth Circuit's

reading is highlighted by one stated basis for its decision: the URA was in complete derogation of the common law as to tenants-at-will, providing relocation payments for such tenants, reasoned the court, and therefore it must similarly abrogate the common law as to utilities. That logic ignores the vital distinction that the Act itself expressly provides for payments to tenants-at-will and does not mention utilities. The inclusion of tenants-at-will in the URA in fact reinforces the city's point: that when Congress reversed the common law as to tenants-at-will, it did so by specifically including them in the URA, which it did not do for utilities.

Not only do the Act itself and its legislative history contain no reference to utilities, which fact should leave the common law intact, but the context of that history clarifies congressional intent to

exclude utilities from URA benefits. The URA attempted to redraw the complex puzzle of diverse statutes and rules governing reimbursement to those displaced by federally aided programs and replace them with a uniform system of payments. Alexander v. HUD, supra. It was not intended to create a new cause of action in utilities, in contrast to the specific provision for reimbursements for displaced utilities under § 123 of the Federal Aid to Highways Act of 1958, 23 U.S. § 123, one of the few provisions not repealed by the URA.[3] Section 123 authorizes reimbursements for

---

[3] The inclusion of utilities in a later act makes it even clearer that URA was not intended to include such benefits. The District of Columbia Redevelopment Agency was listed in the URA as a state agency required to make displacement payments, yet Congress enacted a statute specifically providing for relocation reimbursements to utilities in the District of Columbia. D. C. Public Utilities Reimbursement Act of 1972, Pub. L. No. 92-495. Had the URA already so provided, that law would have been unnecessary.

the cost of relocating utility facilities displaced by highway projects utilizing 90% federal funding.

The District Court in this case pointed out that a legal controversy over those payments in Virginia during the debate over URA "raised a real furor of intense and vocal interest" of which Congress certainly was aware:

> This contest was and is part of the public record and was prominently and contemporaneously in the foreground while passage of the Relocation Act of 1970 was before the Congress.

Chesapeake & Potomac, supra.

The primary purpose of URA, to alleviate the "inequitable burden" and "catastrophic results" of redevelopment programs on "a few citizens," especially poor nonwhites and small businesses, House Report No. 91-1656, reported in 1970 U.S. Code Cong. & Adminis. News at 5850-5852, would not encompass aid to large corporations

like C & P, whose rate structure allowed it to recapture its costs of doing business such as removing its facilities from streets.

HUD also believed that the URA did not authorize relocation payments to utilities and therefore never revised the guideline it promulgated prior to the URA denying them payments, Urban Renewal Handbook RHA § 7209.1, despite the URA's directive to all agencies to issue any new guidelines necessary to implement the Act.

Every court, including the Sixth Circuit, that has considered this subject has taken a position contrary to that of the Fourth Circuit.[4]

---

[4] In addition to the state cases cited in Petitioner's Brief at 13 n. 4, the decisions of all four federal courts that have confronted the issue are opposed to that of the Fourth Circuit: Consumers

(Continued)

Two cases deal with almost identical facts. In Mountain States Telephone & Telegraph Co. et al. v. Boise Redevelopment Agency, No. 52891 (D.C. 4th Jud. D. Idaho, October 27, 1980), the Idaho court wrote:

> Given the stated intent of Congress to unify and coordinate the various federal relocation assistance programs, the state of the common law, and the consequent failure of Congress to clearly provide for the needs of the public utilities and their relocation requirements, it is the opinion of this Court that the U.R.A. was not intended to include within its coverage the reimbursement sought by the plaintiffs in this action.

In Pacific Telephone and Telegraph, supra, the California Court of Appeals

---

[4] (Cont.)
Power Co. v. Costle, 615 F.2d 1147, 1149 (6th Cir. 1980), aff'g, 468 F. Supp. 375 (E.D.Mich. 1979); Lone Star Gas Co. et al. v. Landrieu, No. 80-100-C (U.S.D.C., E.D. Okla., March 30, 1981); Public Service Co. v. Harris, No. 79-C-37-3T (U.S.D.C., N.D. Okla., August 22, 1980).

wrote of the state version of URA:

> Appellant contends that these definitions are all inclusive and that appellant fits within them . . . [and] that since no provision of the Relocation Assistance Law specifically excludes reimbursement of utility costs, the broad general definitions indicate a legislative intent that the common law does not apply.
>
> We disagree. An attempt to exempt utilities from the common law cannot be inferred merely from the broad general definitions used in the Relocation Assistance Law.

Pacific Telephone, supra, at 70-71 (emphasis supplied) (citations omitted).

The Fourth Circuit's decision would have a disastrous impact on cities all over the country. The consequences are potentially devastating for cities, already hard hit by cuts in federal funds, diminishing tax bases, the increasing cost of social programs, the growing number of social-welfare beneficiaries, and the threat of even more local burdens

under the New Federalism policies. Retroactive claims could reach billions of dollars. The potential liability for the City of Norfolk in this case alone could reach one million dollars with interest calculated from the mid-1970's. The future worth of federal funds for community development projects will be substantially lessened, hampering the ability of older cities to maintain themselves solvent financially by redevelopment projects to lure industries and businesses from the suburbs and Sunbelt cities. The money needed to fulfill cities' obligations to utilities companies may mean the difference between economic viability and financial distress.

It would be ludicrous to believe that Congress in 1970, aware of the worsening plight of cities, intended to put such an economic burden on those cities most

in need of community development funds, a burden that does not benefit the urban poor and small businesses Congress sought to aid with the URA and that could add appreciably to the danger of financial collapse of cities.

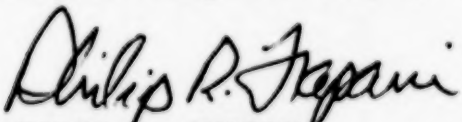
Finally, we have been authorized to represent that the same problem existing in Norfolk exists for most of the sixteen hundred (1,600) cities which retain membership in the National Institute of Municipal Law Officers (NIMLO) and is considered by that organization as a matter of great national significance.

CONCLUSION

The United States Supreme Court should grant certiorari in this matter because the decision at issue treats an important federal statute as acting in complete derogation of state common law without a clear congressional intent to

do so, reverses the usual rule of statutory construction, is contrary to decisions of all other state and federal courts that have dealt with the issue, and will place an unexpected and an unplanned-for economic burden on already besieged cities throughout the country.

Respectfully submitted,



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(Appendices to follow)

CERTIFICATE OF SERVICE

I hereby certify that on this 21st day of July, 1982, three copies of the foregoing Brief Of The Amicus Curiae, The City Of Norfolk, Virginia, In Support Of The Petitioner's Petition For A Writ of Certiorari were mailed, postage prepaid, to each of the following:

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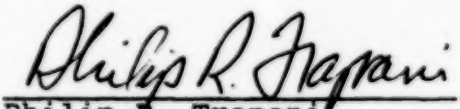

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UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 81-1602

The Chesapeake and Potomac
Telephone Company of Virginia,

Appellant,

versus

Moon Landrieu, in his official
capacity as Secretary of Housing
and Urban Development,

and

Norfolk Redevelopment and
Housing Authority,

Appellees.

Appeal from the United States District Court for the Eastern District of Virginia, at Norfolk. John A. MacKenzie, District Judge.

Argued December 7, 1981

Decided March 25, 1982

Before HAYNSWORTH, Senior Circuit Judge, RUSSELL and WIDENER, Circuit Judges.

Joseph L. Kelly, Jack E. Greer (Williams, Worrell, Kelly and Greer on brief) for Appellant; Francis N. Crenshaw (Ann K. Sullivan, Crenshaw, Ware & Johnson; Justin W. Williams, United States Attorney, Michael L. Rhine, Assistant United States Attorney; Sonia C. Jaipaul, John R. Abbot, Peter M. Campanella on brief) for Appellees.

HAYNSWORTH, Senior Circuit Judge:

The questions are whether a utility company can qualify as a "displaced person" under the Uniform Relocation Assistance and Real Property Acquisition Policies Act, 84 Stat. 1894, 42 U.S.C. §4601 et seq., and whether the plaintiff, Chesapeake & Potomac Telephone Company (C&P), qualifies as a "displaced person" under the facts of this case.

The Department of Housing and Urban Development (HUD) provided funds for the Norfolk Redevelopment and Housing Authority (NRHA) to carry out certain redevelopment projects in Norfolk, Virginia. In

order to carry out these projects NRHA acquired title to certain blighted areas in Norfolk. Because of these projects, C&P was forced to move certain of its telephone lines, cables, conduits, poles and related equipment from what had been streets in Norfolk. Under C&P's franchise agreement with the City of Norfolk, C&P was required to move its lines from public rights-of-way whenever requested by the city to do so.

After moving its lines, C&P requested relocation benefits under the Uniform Relocation Act. C&P's claims were denied at the administrative level. C&P then brought this action in the district court against the Secretary of HUD and NRHA.

After a trial on the liability issue, the district court determined that Congress did not intend for utilities to qualify as displaced persons under the Act. The plaintiff appeals from this order.

I.

The Uniform Relocation Act defines "displaced person" as "any person who... moves... as a result of the acquisition of... real property... for a program or project undertaken by a Federal agency, or with Federal financial assistance...." 42 U.S.C. §4601(6). "Person" is defined as "any individual, partnership, corporation or association." 42 U.S.C. §4601 (5). "Business" is defined as "any lawful activity, excepting a farm operation, conducted primarily - - (A) for the purchase, sale, lease and rental of personal and real property, and for the manufacture, processing, or marketing of products, commodities, or any other personal property; (B) for the sale of services to the public...." 42 U.S.C. §4601(7). Under 42 U.S.C. §4622(a) "displaced persons" are entitled to recover from the government any reasonable expenses incurred in moving

personal property, and a business required to move is a displaced person.

The plaintiff argues that it is a business within the meaning of the Act and thus is entitled to claim reimbursement for expenses as a displaced person. NRHA and HUD argue, however, that the Act was not intended to apply to utilities. HUD bases its argument on the settled common law principle that utilities are not entitled to reimbursement for expenses incurred in moving lines when cities close streets. Because the Act does not explicitly mention utilities as parties that can receive benefits under the Act, and because the legislative history of the Act makes no mention of utilities, HUD argues that the Act was not intended to change the common law. We disagree.

HUD's reliance on the common law is unconvincing. The Act was intended to create rights that were not recognized at

common law. A tenant at will, for example, can recover relocation expenses as a displaced person under the Act even though the common law recognized no such right. The plaintiff in this case is, in certain respects, similar to a tenant at will because it has a right to use the city's streets for its lines only at the will of the city.

Congress' failure to mention utilities during the debates on the Act and in the legislative history of the Act also provides little reason to exclude utilities from the Act's coverage. In Alexander v. United States Department of Housing and Urban Development, 441 U.S. 39, 51 (1979), the Supreme Court noted that the original "Declaration of Policy" in S.1, 91st Cong., 1st Sess. §201(1969), the bill finally enacted as the Uniform Relocation Act, stated that the purpose of the legislation was

> "to establish a uniform policy for the fair and equitable treatment of owners, tenants, and others displaced by the acquisition of real property in Federal and federally assisted programs to the end that such person shall not suffer disproportionate injuries as a result of programs designed for the benefit of the public as a whole."

Similar language is contained in the House Report, H.R. 91-1656 (1970). Thus the Act was intended to extend benefits uniformly to persons who are displaced by federal acquisitions of real property for federal programs. Exclusion of utilities from the Act's coverage would run counter to that purpose.

In the absence of any clear legislative intent to exclude utilities, it is this court's duty to apply the literal language of the statute. Doing so, we find that a utility comes within the Act's definition of "business" and thus

is a "displaced person" under the Act.

II.

HUD contends that the removal of its lines by C&P was not the result of federal acquisition of the real estate. It says that the removal was required by the city's closure of the streets.

Under the statute, relocation expenses are payable if the removal was required "as a result of the acquisition of... real property, in whole or in part..., for a program or project undertaken by a Federal agency, or with Federal financial assistance...." It is true that the city closed the streets, but the removal seems clearly to have been required as a result of the federal acquisition of the real estate.

With respect to most of the relocation costs incurred by C&P, they occurred in situations in which NRHA acquired the land abutting both sides of streets. As

a result of those acquisitions, the project became the owner of the title in fee simple to the land underlying the streets, subject to the city's easement to maintain them as public ways. At the request of NRHA, the city then released its easements so that NRHA became the owner of the land formerly dedicated to use as streets without the burden of that servitude. While in a very technical sense it may have been the city that closed the streets, the city was acting at the direction or request of HUD and NRHA. It was an essential part of the plan of the project that the land occupied by the streets to be closed be acquired free of the city's easement so that such land could be incorporated in the redevelopment plan to the same extent as lands acquired, by purchase or condemnation, from private owners. It was the federal acquisition of the streets, an integral part of the redevelopment plan,

which required removal of C&P's lines.

Some of the removal expense was incurred with respect to lines in streets that were to be widened and other streets which were only partially closed. The record is not sufficient to permit us to decide whether those expenses resulted in whole or in part from the federal acquisition. This should be the subject of further consideration on remand.

III.

Under 42 U.S.C. §4622(a), it is the expense of removal of personal property which is reimbursable, and HUD contends that the utility lines were realty. Its regulations require that what is personal property be determined according to the law of the state in which the property is located,[1] and it relies upon Transcontinental Gas Pipe Line v. Prince William County, 210 Va. 550, 555, 172 S.E.2d 757,

1. 24 C.F.R. §42.40(m)(2).

761-62(1970).

In Transcontinental, gas pipe lines had been installed in land in which Transcontinental had a perpetual easement for the placement, maintenance and operation of the gas line. The easement was unquestionably real property, belonging to the owner of the lines. Under those circumstances, the Virginia Supreme Court held that the gas lines themselves were real estate belonging to Transcontinental. In so doing, it held that the question whether a chattel annexed to real estate has been converted into a fixture principally depends upon the intention of the party making the annexation.

C&P, in placing its lines, could hardly have intended them to become so annexed to real estate belonging to others that the lines themselves became the real property of those other owners. Clearly it intended to maintain ownership and control of these lines which were not

annexed to any real estate owned by C&P of which they might have become a part. Indeed, everyone recognized C&P's right of removal of property which could only have been its personalty.

In similar situations in which a utility's facilities were installed or attached to real estate belonging to others, state courts have found that the facilities remained personal property. See Bangor-Hydro Electric v. Johnson, 226 A.2d 371 (Me. 1967); United Electric Light v. Deliso Const. Co., 52 N.E.2d 353 (Mass. 1943).

HUD and NRHA, however, point to a letter that C&P wrote to the Virginia Commissioner of Revenue requesting that its property be taxed as real property. That it wished its facilities to be treated for purposes of ad valorem taxation as if they were realty is not inconsistent with an intention at the time of

installation that the facilities remain its personal property subject to its control and possible removal. Indeed, if the facilities had become part of the real estate to which they were attached, C&P should have been subject to no ad valorem taxation upon them, for they would not have been the property of C&P.

This result is consistent with the purpose of the personal property limitation. The former owners of land acquired for the redevelopment project are compensated through a purchase agreement or a condemnation proceeding. By agreement, there might be a severance of a fixture and its reconversion to personalty, but once real estate has been sold and paid for, it is no longer subject to removal by the former owner. The Act thus contemplates no reimbursement of expense in connection with the removal of non-removable real estate. It is limited to the expense

of removal of personal property, for the owner is not otherwise compensated for that expense. There is no possibility of double compensation here, for C&P did not sell any land, and it received no compensation through any sale or condemnation.

IV.

We reverse and remand this case for further proceedings consistent with this opinion.

REVERSED AND REMANDED

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Norfolk Division

THE CHESAPEAKE AND POTOMAC
TELEPHONE COMPANY OF VIRGINIA,

Plaintiff

v.

CIVIL
ACTION
NO. 79-906-N

MOON LANDRIEU, ETC., and
NORFOLK REDEVELOPMENT AND
HOUSING AUTHORITY,

Defendants

MEMORANDUM OPINION

The Chesapeake and Potomac Telephone Company of Virginia ("Telephone Company") here sues the Secretary of Housing and Urban Development ("HUD") and Norfolk Redevelopment and Housing Authority ("NRHA"), seeking reimbursement for the relocation of its telephone lines, cables, conduits, poles, and related equipment in

four federally-aided redevelopment projects in the City of Norfolk, Virginia. The central issue is the applicability of the provisions of the Federal Relocation Assistance Act, also known as the Uniform Relocation Act of 1970 ("URA"), 42 U.S.C. §§4601 et seq. The Virginia Legislature has adopted an enabling act to bring Virginia localities under the umbrella of the federal Uniform Relocation Act. See, §§25-235 et seq., Code of Virginia.

It is stipulated that the defendant NRHA acquired title to certain blighted areas in Norfolk for the purpose of redevelopment projects; that the land so acquired included streets in which the Telephone Company's lines and conduits were located; and that in the redevelopment of the areas the Telephone Company was required to relocate its utility equipment in accordance with the plan established for the redevelopment of

each pertinent area.

The statutes relied upon in the Telephone Company complaint are part of the Federal Relocation Assistance Act, 42 U.S.C. §§4601, 4622 and 4637, and read as follows:

> "4622. (a) Whenever the acquisition of real property for a program or a project...will result in the displacement of any person...the head of such agency shall make a payment to any displaced person...for - (1) actual reasonable expenses in moving himself, his family, business, farm operation or other personal property; (2) actual direct losses of tangible personal property as a result of moving or discontinuing a business or farm operation, but not to exceed an amount equal to the reasonable expenses that would have been required to relocate such property....
>
> "§4601. Definitions. As used in this chapter -
>
> (5) The term 'person' means any individual, partnership, corporation or association.

> (6) The term 'displaced person' means any person who...moves from real property, or moves his personal property from real property as a result of the acquisition of such real estate, in whole or in part, or as a result of the written order of the acquiring agency to vacate such real property, for a program or a project ....
>
> (7) The term 'business' means any lawful activity, excepting a farm operation conducted primarily -
>
> (a) for the sale of services to the public....
>
> "§4637. A person who moves or discontinues his business, or moves other personal property...as a direct result of any project or program...shall...be deemed to have been displaced as a result of the acquisition of real property."

HUD and NRHA, defendants, deny that the Uniform Relocation Assistance Act includes public utilities such as the Telephone Company or that the statutes are to be given the broad reading necessary to encompass the plaintiff's claim.

Concluding that utilities are not

included under the Uniform Relocation Act of 1970, we DENY the Telephone Company's request for reimbursement thereunder.

I

In the litigation of situations reasonably akin factually to those presented here, courts have been unanimous in denying such utility relocation claims. Consumer Power Company v. Costle, 615 F.2d 1147 (6th Cir. 1980), held that relocation benefit for a gas main which had to be relocated in a new right-of-way in a redevelopment project was denied; Pacific Telephone and Telegraph v. Redevelopment Agency of Glendale, 151 Cal. Rptr. 68, 87 Cal. App. 3d 296 (1978), under a State Act of the same language as the federal Relocation Act, the court found that a public utility accepts franchise rights

in public streets subject to an implied obligation to relocate those facilities at its own expense when necessary to make way for a redevelopment project relieving urban blight. Artesian Water Co. v. State Department of Highways and Transportation, 330 A.2d 432 (Del. 1974), held that the Uniform Relocation Act was not intended to extend coverage to include utilities within its definition of displaced persons or businesses. Mountain States Telephone and Telegraph Company v. Boise Redevelopment Agency, 607 P.2d 1084, 101 Idaho 30 (1980), stated that the overwhelming view in this country is that public utilities are not entitled to relocation costs incurred in making way for governmentally sponsored projects and the Uniform Relocation Act does not change this common law rule. To like effect, Public Service Company of Oklahoma v. Harris, No. 79-C-37-3T (N.D. Okla, August 22, 1980);

Lone Star Gas Company, etc. v. Moon Landrieu, No. 80-100-C (E.D. Okla., March 30, 1981).

These cases are ample authority, upon almost identical factual situations and with the same state and federal statutory overview that a private utility company is not a beneficiary for relocation expenses under the Uniform Relocation Act of 1970.

II

The common law has long been fully developed that utilities, shielded from competition by a franchise, accept their right to install utility lines in public rights-of-way thoroughly cognizant of their obligation to relocate such lines upon demand at no cost to the City, County or State. No authority for this obligation need be cited.

In Virginia during the period of the conception of the Uniform Relocation Act, the mid-1960's, relocation costs of utility lines, particularly in the expansion of highways, raised a real furor of intense and vocal interest both to the utilities attempting to collect reimbursement and to the Virginia Highway Department in its disclaimer of liability for such costs. Potomac Electric Power Company v. Fugate, 275 F.Supp. 566 (E.D. Va. 1967); PEPCO v. Highway Commissioner, 211 Va. 745, 180 S.E.2d 657 (1971); Potomac Power Electric Power Company v. Fugate, 341 F.Supp. 887 (1972); Potomac Elec. Power Co. v. Fugate, 574, F.2d 1163 (4th Cir. 1978). This contest was and is part of the public record and was prominently and contemporaneously in the foreground while passage of the relocation Act of 1970 was before Congress.

In the adoption of the Uniform Relocation Act of 1970 if Congress chose to abrogate such a well known common law principal, it would certainly have included in that legislation a clear affirmative statement of that revocation. Instead, no such reversal of the common law concept appears in the language of the Act nor its legislative notes and history. So also, in light of then ongoing litigation over relocation costs, had it been the intent of Congress to reimburse utilities for relocation costs in redevelopment projects, it appears that such intent most certainly would have been specifically stated in light of the fact that Congress had passed a special statute, the Federal Highway Aid Act in 1958, to give such relief to utilities relocating lines to accommodate the interstate highway system.

Lastly, public utilities retrieve their operating costs and the reasonable return on their investment from the general public in their franchise area through rates that are structured to accommodate costs and expenses. No other "persons," "corporations," or "displaced persons," except utilities are so protected by a franchise with a non-competitive market area.

The language of the Supreme Court in Alexander v. U.S. Dept. of HUD, 441 U.S. 39 (1979), indicates the thoroughness of the discussion of the Relocation Act before both the House of Representatives and the Senate Committee. Apparently, many witnesses appeared seeking to enlarge the umbrella of reimbursement to many classes of "displaced persons." No mention is made of any appearances before the Committees of Congress by utility representatives. In the end, as Alexander pro-

claims, the extension of relocation assistance was limited to a fairly narrow group and did not include utilities.

> "The structure of the Relocation Act confirms our conclusion that Congress did not expect to provide assistance for all persons somehow displaced by Government programs." Alexander, supra at page 60.

We believe that it is those unprotected, unfranchised corporations and persons which were contemplated by Congress under the Uniform Relocation Act. A utility company, C & P Telephone Company, serving these redeveloped areas under its franchise is not called upon to compete. Its rates are established by petitions to the State Corporation Commission which takes into consideration the accounting data essential to the life of the utility and fixes a rate to cover its costs and expenses. On the other hand, a Mom and Pop business, a grocery store, a retail

furniture outlet, for instance, which is subjected to the sudden trauma of being forced to relocate elsewhere must do so under competitive conditions in which it cannot realistically raise the price of its products to cover extraordinary relocation costs. It must compete in the market place against competitors beyond the redeveloped area who have no such cost to recoup. These are the "persons," "businesses," "displaced persons," to which the Uniform Relocation Assistance Act extends its largesse.

For the reasons herein stated, the plaintiff's prayer for relief is DENIED.

/s/ John A. MacKenzie
United States District Judge

Norfolk, Virginia
June 4, 1981.

MOTION FILED

JUN 22 1982

No. 81-2332

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

NORFOLK REDEVELOPMENT AND HOUSING AUTHORITY, a political subdivision of the Commonwealth of Virginia,
Petitioner,

v.

THE CHESAPEAKE AND POTOMAC TELEPHONE COMPANY OF VIRGINIA,
Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF THE UNITED STATES CONFERENCE OF MAYORS IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

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TABLE OF CONTENTS

	Page
MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE	ii
Table of Authorities	v
BRIEF AMICUS CURIAE OF THE UNITED STATES CONFERENCE OF MAYORS	1
THE INTEREST OF THE AMICUS CURIAE	2
SUMMARY OF THE ARGUMENT	5
ARGUMENT	7
I. The Uniform Relocation Act Should Not Be Construed to Cover Utilities as "Displaced Persons" Absent Clear Congressional Statement	7
II. Construing the Uniform Act to Include Utilities as "Displaced Persons" Will Yield Incongruous and Undesired Results	12
CONCLUSION	16

IN THE SUPREME COURT OF THE
UNITED STATES

NORFOLK REDEVELOPMENT AND HOUSING
AUTHORITY, a political subdivision
of the Commonwealth of Virginia,

Petitioner,

v.

THE CHESAPEAKE AND POTOMAC TELEPHONE
COMPANY OF VIRGINIA,

Respondent.

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF THE UNITED STATES CONFERENCE OF MAYORS IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

Pursuant to Rule 36 of the Rules of the Supreme Court of the United States, the United States Conference of Mayors hereby moves for leave to file a brief Amicus Curiae in the above-captioned proceedings, and in support thereof states:

1. The decision of the United States Court of Appeals for the Fourth Circuit, in providing relief to the Respondent, appears deficient in its analysis of the relationship of the commo

law to the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, 42 U.S.C. §§4601 et seq., in that it misread both the language of the Act and the intent of Congress as they relate to matters in derogation of the common law.

2. The decision below will have far reaching consequences for the cities of America, virtually all of which have undertaken significant economic and community development rehabilitation projects which included the use of federal funds to effect their result. If allowed to stand, the decision below may well result in vast, new and unanticipated liabilities which will fall on cities.

3. The Fourth Circuit decision also reflects a substantial change in the direction of the construction of the Act and Amicus intends to demonstrate in its brief that the decision is an unreasonable interpretation of the law which will have incongruous and undesirable results.

4. This case presents important issues

of law of direct and immediate concern to the members of the Amicus Curiae, the nation's cities.

5. Accordingly, the Amicus Curiaę seeks this opportunity to make known its views to the Court and to attempt to assist the Court in its decision on the need to review this case.

6. Counsel for Amicus Curiae has sought, but was unable to secure from Respondent, consent to file this brief Amicus Curiae.

Respectfully submitted,

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TABLE OF AUTHORITIES

Page

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STATUTES

Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, 42 U.S.C. §§4601 et seq., ... Passim

Federal Aid Highway Act of 1958, 23 U.S.C. §123 . . . . . 10, 11

Federal Highway Act of 1968, §§32 & 33, P.L. 90-495, (Repealed) 10

OTHER SOURCES

Sands, Sutherland Statutory Construction (4th Ed., 1973) 16

No. 81-2332

IN THE SUPREME COURT OF THE UNITED STATES

October Term 1982

NORFOLK REDEVELOPMENT AND HOUSING AUTHORITY, a political subdivision of the Commonwealth of Virginia,

Petitioner,

v.

THE CHESAPEAKE AND POTOMAC TELEPHONE COMPANY OF VIRGINIA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF AMICUS CURIAE

OF

THE UNITED STATES CONFERENCE OF MAYORS

THE INTEREST OF THE AMICUS CURIAE

The UNITED STATES CONFERENCE OF MAYORS is an organization of city governments represented through their chief elected officials, Mayors. The Conference was organized in 1932 to promote the causes of the city and to foster responsible and effective relationships between city halls and the federal government. The Conference of Mayors is the national forum through which the elected officials of the nation's larger cities express their concerns and work to meet the needs of urban America. By limiting its membership to cities of over 30,000 in population, the Conference of Mayors represents the needs of larger cities. Of the 800 cities eligible for membership in the Conference, over 480 are full members, including virtually all cities of over 100,000 in population.

The United States Conference of Mayors is a not-for-profit membership corporation organized under the laws of the State of

Illinois. It is domiciled in the District of Columbia.

Petitioner, NORFOLK REDEVELOPMENT AND HOUSING AUTHORITY, works closely with the city and Mayor of Norfolk, Virginia. (See the description of the relationship at pp. 3 - 5 of the Petition for Certiorari.) The City of Norfolk, Virginia is a full and active member of the Conference of Mayors, and the Mayor of Norfolk, Vincent J. Thomas, serves as chairman of the Conference's Sub-committee on Community Development of the standing Committee on Community Development, Housing and Economic Development.

In addition to the substantial effect the decision below will have on the City of Norfolk, the Conference of Mayors is concerned that cities throughout the United States will be facing claims, both retro-active and current, for relocation assist-ance for public utilities. This development, resulting solely from the interpretation of the Uniform Act by the Fourth Circuit, would

be at variance with long lines of cases under the common law and could effectively obviate long-settled patterns and practices whereby the state legislatures provided for the allocation of costs for relocation of facilities by public utilities between taxpayers and rate payers by use of their oversight authority over municipalities and public utility rate setting commissions.

The fundamental change in the determination of these issues between federal and state law which would result from the decision below is simply unacceptable in the federal system without some clearer statement of congressional intent that this result should ensue.

This change, and the costs associated with it, both in terms of dollars and the loss of local and state control over some aspects of public utility franchising, will adversely affect the nation's cities. Accordingly, the Conference of Mayors urges that the Court grant the Petition for Certiorari in this cause.

SUMMARY OF ARGUMENT

The decision of the United States Court of Appeals for the Fourth Circuit should be reviewed by this Court as it misreads the Uniform Relocation Act and such misreading has far reaching economic consequences.

1. The well-settled rule of common law is that utilities bear their cost of relocation when displaced from public rights of way. The court below violated the standard rules of statutory construction when it ruled that the Uniform Act provided reimbursement of such costs in the absence of a clear indication of congressional intent to do so.

2. The inclusion of utilities in the definition of "displaced person" under the Uniform Act will lead to unreasonable, undesirable, and even absurd results, Congress certainly did not intend. Utilities invariably recover their relocation costs from their consumers through additions to their rate base, and reimbursement under the Uniform Act will constitute an undesirable and unin-

tended windfall. Further, under the decision below, although some utilities will recover their relocation costs, many, if not most, others will not under identical factual circumstances of displacement.

The only reasonable - and the correct - construction of the Uniform Act is that Congress intended to leave undisturbed the existing and settled common law that excluded utilities from being reimbursed for relocation of their equipment upon displacement.

ARGUMENT

I.

THE UNIFORM RELOCATION ACT SHOULD NOT BE CONSTRUED TO COVER UTILITIES AS "DISPLACED PERSONS" ABSENT CLEAR CONGRESSIONAL STATEMENT

The U.R.A. and its legislative history demonstrate Congress did not intend to extend relocation assistance to all persons displaced by governmental actions. Alexander v. HUD, 441 U.S. 39 (1979).

At common law, utilities have to relocate their facilities at their own expense when displaced from public streets. Mountain States Telephone & Telegraph Co., et al. v. Boise Redevelopment Agency, 101 Idaho 30, 607 P2d 1084 (1980).

By their nature, utilities provide a governmental or other public service to the population. Uniquely, utilities are the only nontransportation operations allowed to install, maintain and operate their facilities in public rights of way. In doing so they obtain franchises which in some instances are

regarded as property rights. See e.g. Owensboro v. Cumberland Telephone & Telegraph Co., 230 U.S. 58, 65 (1913).

However the easements or rights granted utilities are in trust for the public and not a grant of right to private individuals. New Orleans Gaslight Co. v. Drainage Commission of New Orleans, 197 U.S. 453 (1905). Moreover, by such grant the utility does not thereby acquire a right to install its equipment in any specific location. id. at 197 U.S. 461.

When utilities are forced to relocate within or from specific public right of way, it is not because the public has terminated or acquired the utilities' right to provide services; the government merely requires a utility to relocate elsewhere for a public project involving that right of way. Courts have recognized this distinction, and have treated utility relocation as a cost of doing business (non-compensable) rather than an acquisition of a property right (compensable) under common law. See e.g. Detroit Board of

Education v. Michigan Bell Telephone Co., 51 Mich App. 488, 502, 215 NW 2d 704, 711 (1974), affd. 395 Mich 1, 232 NW 2d 633 (1975).

Because utilities provide essential public services, when required to relocate their equipment from a specific right of way, they invariably are provided an alternative location by the government so that the essential services are not terminated or interrupted.

As our cities and local communities have developed, there have been countless instances in which such utility relocations have occurred. The governments and utilities have resolved the allocation of those costs through the mechanism of rate adjustments by public bodies regulating these utilities. The method of apportioning such costs is often a complex matter requiring an enormous amount of technical testimony appropriate for resolution by a public regulatory agency and not the courts. See, e.g. Consumer Power Co. v.

Costle, 615 F2d 1147 (CA 6, 1980). The settled practice has been to apportion such relocation costs in state and local rate-making proceedings, as was done with respect to C & P Telephone in the instant case.

In light of this well known body of state law and practice, and the universal nature of the problem, Congress would be expected to have deliberated expressly about including utilities as displaced persons under the Uniform Act before changing a long-standing system of treatment of utility relocation expenses.

Moreover, in enacting the Uniform Act, Congress repealed eleven federal statutes or portions thereof, including Sections 32 and 33 of the Federal Highway Act of 1968 (Public Law 90-495). However Congress did not repeal Section 123 of the Federal Aid Highway Act of 1958 (23 U.S.C. Sec. 123) which authorizes federal reimbursement of utility relocation expenses only when permitted by state law or when required by contract between the state and the utility. Consequently, the Uniform

Act does not apply to utilities relocated under this federal aid highway program, and those utilities continue to bear their own relocation costs in the great majority of states.

The Uniform Act and 23 U.S.C. Sec. 123 must be construed harmoniously wherever possible. Morton v. Mancari, 417 U.S. 535, 551 (1974). However, to give effect to Sec. 123, the Uniform Act cannot apply to utility relocation under the Federal Aid Highway Act of 1958. Logically, it can either apply (a) only to other utility relocations under federal programs or (b) not at all to utility relocation. In view of its primary purpose of uniformity in treatment, the Uniform Act must be construed not to cover any utility relocations.

The Uniform Act, which is in derogation of the common law, is to be read favoring the retention of long established and familiar common law principles except where a statutory purpose to the contrary is evident. Isbrandtsen

v. Johnson, 343 U.S. 779, 783 (1932). Absent the clearest statement of Congressional policy, the court should not impute to Congress an interest to authorize action in contravention of settled common law principles. Tarlton v. Saxbe, 165 U.S. App. D.C. 293, 507 F2d 1116 (D.C. Cir. 1974).

Thus the terms "displaced person", "person" and "business" under the Uniform Act should not be extended to utilities inasmuch as Congress did not express its intent so to change the settled body of common law, or prior federal law relating to such utility matters. These are matters that should be resolved by the Congress rather than the Courts. See Consumer Power Co. v. Costle, supra at p. 1150.

II.

CONSTRUING THE UNIFORM ACT TO INCLUDE UTILITIES AS "DISPLACED PERSONS" WILL YIELD INCONGRUOUS AND UNDESIRED RESULTS

Far from promoting uniformity of treatment of displacees, Alexander v. HUD, supra, the Uniform Act as construed by the Fourth Circuit below will reimburse the relocation expenses,

but exclude others under similar factual circumstances. The decision will lead to incongruous, undesirable and even absurd results.

Under the Uniform Act, displaced persons are paid only for the relocation or loss of their personal property. 42 U.S.C. Sec. 4622. However, in many, if not most states, utility equipment installed in public rights of way is treated as real property. See e.g. Fischbach & Moore, Inc. v. State Board of Equalization, 117 CA 3d 627 (1981) (California); Kalamazoo Municipal Utilities Association v. City of Kalamazoo, 345 Mich 318 (1956) (Michigan); In the Matter of Manhattan Cable TV Services v. Tax Commission of City of New York, 49 N.Y. 2d 868 (1980); (New York).

Thus, in numerous instances utilities will not be eligible for relocation assistance under the Uniform Act even if the other criteria of the law are met.

From the viewpoint of the utilities, distinction between real and personal property is meaningless in the context of the Uniform Act.

Utility equipment when placed in a public right of way is assumed to be placed there permanently. When a utility is displaced from a right of way, it invariably installs new equipment in the substitute location; it abandons the old equipment save that which has sufficient salvage value. Thus utilities alone, unlike other businesses, never intend to relocate their equipment when displaced. However utilities, unlike other businesses, anticipate frequent displacement, given their location in public rights of way. Further, all utilities typically depreciate their equipment over an assumed period of useful life, and this cost accounting is reflected in the utilities' rate bases. As a result, when any utility is reimbursed under the Uniform Act, it effectively represents a windfall payment for costs it has already recovered or will recover from its consumers.

A further incongruity results from the fact that utilities alone locate equipment in public rights of way, and often those rights of way, being in public ownership, are not acquired

for a federal project or one undertaken with federal financial assistance. Thus, displacement because of adjustments in the particular right of way in connection with such a project ordinarily does not involve acquisition of such property. Even if the public right of way were changed to some other use, there would be no acquisition so long as title to that property was not transferred. In either event, the utility has been displaced. But, if the city which owned the right of way transferred title to the right of way to another, then under the Fourth Circuit decision, the utility displacement cost would be reimbursable under the Uniform Act.

These distinctions point up the incongruous and irrational results different utilities will encounter under essentially similar situations arising under projects covered by the Uniform Act.

The term "displaced person" under the Uniform Act can be construed to exclude as well as include utilities. Since to include

utilities would yield unreasonable results, the golden rule of statutory construction requires that the only reasonable construction - the exclusion of utilities from the definition - be selected. 2A Sands, Sutherland Statutory Construction § 45.12 at 37 (4th Ed 1973). See also Commissioner of Internal Revenue v. Brown, 380 U.S. 563 (1965).

These incongruous aspects of the Fourth Circuit's decision leading to unreasonable results indicate it does not represent Congressional intent and should not be sustained. When the plain meaning of a statute produces an unreasonable, even if not absurd, result plainly at variance with the policy of the legislation, the courts will follow the purpose of the statute rather than the literal words. United States v. American Trucking Association, 310 U.S. 534, 543 (1940). See also, Helvering v. Hammel, 311 U.S. 504, 510, 511 (1941).

CONCLUSION

For all the foregoing reasons, the Court

of Appeals decision in this case should be reviewed by this Court.

Dated: July 21, 1982

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CERTIFICATE OF SERVICE

I hereby certify that on this 22nd day of July, 1982, three copies of the foregoing Motion for Leave to File Brief Amicus Curiae and Brief Amicus Curiae were mailed, postage prepaid to each of the following:

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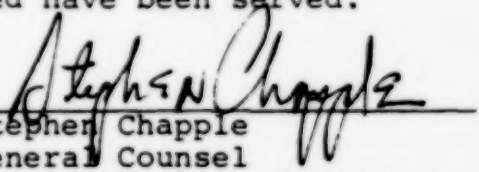

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Docket No. 81-2332

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

NORFOLK REDEVELOPMENT AND HOUSING AUTHORITY, A POLITICAL SUBDIVSION OF THE COMMONWEALTH OF VIRGINIA,
Petitioner,

v.

THE CHESAPEAKE AND POTOMAC TELEPHONE COMPANY OF VIRGINIA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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PETITIONER'S BRIEF ON THE MERITS

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QUESTION PRESENTED

Whether The Chesapeake & Potomac Telephone Company of Virginia ("C&P"), a public service corporation operating under the laws of the Commonwealth of Virginia, is a "displaced person" under the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, 84 Stat. 1894, 42 U.S.C. § 4601 *et seq.* (the "URA"), when it seeks reimbursement for the costs of removing its telephone distribution facilities from public rights-of-way in the execution of an urban renewal project funded in part by grants from the Department of Housing and Urban Development ("HUD").

THE PARTIES TO THE PROCEEDINGS BELOW

The complaint was filed in the District Court below by C&P against Moon Landrieu, in his official capacity as Secretary of Housing and Urban Development and against Norfolk Redevelopment and Housing Authority ("NRHA"). Both defendants took identical positions in opposition to the C&P claim in the District Court and in the appeal by C&P to the Circuit Court of Appeals for the Fourth Circuit. After the litigation was commenced, HUD and NRHA entered into a financial settlement of the urban renewal projects in which the C&P claim arose. As a result of that settlement the responsibility for payment of any judgment rendered in this case will fall upon NRHA, not HUD. Accordingly, HUD did not join in the Petition for Certiorari.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
THE PARTIES TO THE PROCEEDINGS BELOW	ii
OPINIONS BELOW	1
JURISDICTION	1
STATUTE INVOLVED	2
STATEMENT OF THE CASE	2
SUMMARY OF THE ARGUMENT	6
ARGUMENT	9
I. UNDER ITS FRANCHISE C&P ACQUIRED NO PROPERTY RIGHTS AND IS REQUIRED TO MOVE ITS FACILITIES FROM A PUBLIC RIGHT-OF-WAY AT ITS EXPENSE	9
A. The Franchise Ordinance	9
B. The Applicable Law	10
II. THE DECISIONS WHICH HAVE HELD THAT THE URA DID NOT CHANGE THE COMMON LAW CONTAIN SOUNDER LOGIC AND A MORE CAREFUL ANALYSIS THAN THAT FOUND IN THE OPINION OF THE COURT OF APPEALS FOR THE FOURTH CIRCUIT	13
A. The decision of the Circuit Court of Appeals for the Fourth Circuit	13
B. Other courts which have construed the URA have held that a utility company is not a "displaced person" with reference to the relocation of transmission facilities	14

TABLE OF CONTENTS—Continued

Page

C. This court refused a claim for relocation benefits under the "written order" clause of the URA which was based on the theory that the right supporting the claim was implied in the language of the URA 15

D. The comparison of C&P's rights to those of a tenant at will used by the court below is not appropriate 17

E. If the cost of relocating its transmission lines is to be shifted away from C&P, a clear statutory mandate is required to change the existing common law 18

III. THE LEGISLATIVE HISTORY OF THE URA DOES NOT SUPPORT THE CLAIM BEING ASSERTED BY C&P 20

IV. IN CONTRAST TO THE ABSENCE OF CONGRESSIONAL INTENT TO PROVIDE REIMBURSEMENT FOR UTILITY RELOCATION IN THE URA, THE FEDERAL-AID HIGHWAY ACT AND ITS LEGISLATIVE HISTORY DEMONSTRATE A CLEAR INTENT TO PERMIT REIMBURSEMENT FOR UTILITY RELOCATION UNDER CERTAIN CIRCUMSTANCES 25

V. THE ADMINISTRATION OF THE URA BY FEDERAL AGENCIES AND THE SUBSEQUENT ACTION OF CONGRESS SUPPORT THE CONTENTIONS OF NRHA 28

A. The agencies 28

B. Inconsistent Congressional action 29

VI. UNDER VIRGINIA LAW THE C&P FACILITIES INVOLVED IN THIS CLAIM ARE REAL PROPERTY, NOT PERSONALTY 32

TABLE OF CONTENTS—Continued

	Page
VII. C&P DID NOT MOVE ITS TRANSMISSION LINES AS A RESULT OF THE ACQUISITION OF LAND	35
A. C&P moved its facilities because of the requirements of the Franchise	35
B. The acquisition of land in the several projects, having been completed well before C&P was required to move, did not cause the relocation of the C&P facilities	36
CONCLUSION	39

TABLE OF AUTHORITIES

CASES: Page

Alexander v. *HUD*, 441 U.S. 39 (1979) 15, 16
Artesian Water Co. v. *State Dept. of Highways & Transp.*, 330 A.2d 432 (Del. 1974) 10, 14, 30
Bangor-Hydro Electric Co. v. *Johnson*, 226 A.2d 371 (Me. 1967) 34
Bell Telephone Co. of Pennsylvania v. *Pennsylvania Public Utility Comm'n*, 139 Pa. Super. Ct. 529, 12 A.2d 479 (1940) 12
Central Maine Power Co. v. *Waterville Urban Renewal Auth.*, 281 A.2d 233 (Me. 1971) 10, 11, 13
Chesapeake & Potomac Telephone Co. v. *Landrieu*, No. 79-906-N (E.D. Va. June 4, 1980), rev'd, 674 F.2d 298 (4th Cir. 1982) cert. granted Jan. 17, 1983 6
City of Lynchburg v. *Peters*, 145 Va. 1, 133 S.E. 674 (1926) 37
Consumers Power Co. v. *Costle*, 615 F.2d 1147 (6th Cir. 1980) 38
Delaware River Port Auth. v. *Pennsylvania Public Utility Comm'n*, 393 Pa. 639, 145 A.2d 172 (1958) 14, 19
Hampton Roads Sanitation District Comm'n v. *Chesapeake*, 218 Va. 696, 240 S.E.2d 819 (1978).. 12
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Holden v. *New York Telephone Co.*, 31 A.D.2d 812, 298 N.Y.S.2d 256 (1969) 36
Humble Oil & Refining Co. v. *Copeland*, 398 F.2d 364 (4th Cir. 1968) 33
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Mountain States Telephone & Telegraph Co. v. *Boise Redevelopment Agency*, No. 52891 (Dist. Ct. Idaho, Oct. 27, 1980) 14, 15
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TABLE OF AUTHORITIES—Continued

Page

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Opinion of the Justices, 101 N.H. 527, 132 A.2d 613 (1957) 18
Pacific Telephone & Telegraph Co. v. *Redevelopment Agency of Glendale*, 151 Cal. Rptr. 68, 87 Cal. App. 3d 296 (1978) 14
Pennhurst State School and Hospital v. *Halderman*, 451 U.S. 1 (1981) 39
PEPCO v. *Fugate*, 211 Va. 745, 180 S.E.2d 657 (1971) 10
Port of New York Auth. v. *Hackensack Water Co.*, 41 N.J. 90, 195 A.2d 1 (1963) ..10, 12, 14, 16, 20, 33, 36
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STATUTES:

28 U.S.C. § 1254(1) 2
28 U.S.C. § 1361 1
28 U.S.C. § 1331(a) 1
42 U.S.C. § 1453 2
42 U.S.C. § 1456(1) 1
42 U.S.C. § 4601 *et seq.* 2, 17, 32, 35
District of Columbia Public Utilities Reimbursement Act of 1972, P.L. No. 92-495, 86 Stat. 812 (1972) 30
Federal-Aid Highway Act of 1956, Pub. L. No. 627, 87 Stat. 250 (1956) 7, 11, 18, 27, 30
Federal-Aid Highway Act of 1958, Pub. L. No. 85-831, 72 Stat. 89 (1958) 7, 30
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TABLE OF AUTHORITIES—Continued

Page

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FEDERAL REGULATIONS:

7 CFR Part 21 (1981) 28
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13 CFR Part 308 (1981) 28
15 CFR Part 916 (1981) 28
18 CFR Part 1306 (1981) 28
23 CFR Part 740 (1981) 28
24 CFR § 42.1 *et seq.* 29
24 CFR Part 42 (1981) 28
29 CFR Part 12 (1981) 28
29 CFR Part 91 (1981) 28
32 CFR Part 641 (1981) 28
32 CFR Part 742 (1981) 28
34 CFR Part 15 (1981) 28
36 CFR Part 904 (1981) 28
38 CFR Part 25 (1981) 28
39 CFR Part 777 (1981) 28
40 CFR Part 4 (1981) 28
40 CFR Part 30.405-2 (1981) 28
41 CFR Part 101-18 (1981) 28
41 CFR Part 114-50 (1981) 28
41 CFR Part 128-18 (1981) 28
45 CFR Part 15 (1981) 28
49 CFR Part 25 (1981) 28

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Page

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MISCELLANEOUS:

51 Comp. Gen. 167 (1971) 32
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

Docket No. 81-2332

NORFOLK REDEVELOPMENT AND HOUSING AUTHORITY, A POLITICAL SUBDIVSION OF THE COMMONWEALTH OF VIRGINIA,

Petitioner,

v.

THE CHESAPEAKE AND POTOMAC TELEPHONE COMPANY OF VIRGINIA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

PETITIONER'S BRIEF ON THE MERITS

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit is reported at 674 F.2d 298. The opinion of the United States District Court for the Eastern District of Virginia is unreported, but is set out in Appendix B to the Petition for Certiorari and in the Joint Appendix (hereinafter "A.") at p. 48. Jurisdiction in the District Court was invoked under 28 U.S.C. § 1331(a), 28 U.S.C. § 1361 and 42 U.S.C. § 1456(1).

JURISDICTION

The opinion of the United States Court of Appeals for the Fourth Circuit was rendered on March 25, 1982. The Petition for Certiorari was filed on June 22, 1982, within

ninety days from the date of the judgment of the Court of Appeals. The Writ of Certiorari was granted by this Court on January 17, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

The statute involved in this case is the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, 84 Stat. 1894, 42 U.S.C. § 4601, *et seq.* The pertinent provisions of the statute are set out in the Appendix to the Petition for Certiorari.

The provisions of the URA which are particularly relevant to this case appear at 42 U.S.C. § 4601 as follows:

> (5) The term 'person' means any individual, partnership, corporation or association.
>
> (6) The term 'displaced person' means any person who, on or after January 2, 1971, moves from real property, or moves his personal property from real property as a result of the acquisition of such real property, in whole or in part, or as the result of the written order of the acquiring agency to vacate real property, for a program or project undertaken by a Federal agency, or with Federal financial assistance . . .

STATEMENT OF THE CASE

Norfolk Redevelopment and Housing Authority ("NHRA"), which is a political subdivision of the Commonwealth of Virginia, has undertaken four redevelopment or conservation projects federally funded under Title I of the Housing Act of 1949 (specifically 42 U.S.C. § 1453) in order to eliminate slums and blight and to prevent their recurrence by means of the wholesome redevelopment of the project areas. In each project NRHA adopted a plan prescribing the public action which was contemplated. These actions included the acquisition of private property, demolition of blighted buildings, realignment of street patterns, rezoning, construction of speci-

fied site improvements and disposition of the land for public or private uses.

After each plan was adopted by NHRA it was approved by the Council of the City of Norfolk. The three redevelopement projects encompassed the most blighted or worst buildings in certain areas of the City, and the plans for these projects called for the acquisition of virtually all of the land in each project area and demolition of the buildings situated thereon. The conservation project covered an area where the properties were deteriorating; but as most structures could be saved, the planned acquisition of land and demolition of buildings in the conservation project area was infrequent and selective (A. 190).

After approval of the redevelopment and conservation plans by the City, and after execution of grant-in-aid contracts with HUD,[1] NRHA commenced the acquisition of individual properties within the several project areas. It took several years to acquire all of the lots upon which private homes or other structures had been erected. For example, in the Rosemont Redevelopment Project, acquisition of individual parcels began in 1963 and was not completed until 1968 (A. 250-257).

The primary purpose of the redevelopment plans was to eliminate blight and to prevent its recurrence. Thus, after the blighted properties had been acquired and cleared, the land was made available for development and a new street pattern was developed by NRHA and the appropriate City departments. The framework of the streets was dependent on traffic expectations related to

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[1] Under the conventional urban renewal concept, HUD furnished two-thirds of the net project cost. The City of Norfolk was required to provide (either in cash or by approved public works) the remaining one-third of the net project cost. In the projects here involved the City provided its one-third share by means of public improvements and all of the cash required was provided by HUD (A. 187-188).

the new development which was expected within the project area (A. 197-198). However, NRHA has no legislative power to close streets, and under Virginia law the City Council cannot agree in advance to close streets (i.e., at the time the urban renewal plans are adopted by NRHA or approved by the City.[2] Accordingly, NRHA filed petitions to close individual streets or parts thereof after the land on both sides of the streets had been acquired (A. 40-41). The City of Norfolk subsequently adopted ordinances closing each of the streets for which a petition had been filed.

C&P is a public service corporation licensed to do business in the State of Virginia and in the City of Norfolk. Pursuant to its written franchise agreement, it had placed telephone transmission facilities within the public rights-of-way of certain streets throughout the City of Norfolk, including streets lying within the urban renewal project area. These facilities consisted primarily of large concrete structures, conduits, cables and accessory fittings buried under the surface of the streets.[3] When the urban renewal plans were being considered, and in the public hearings conducted prior to their adoption, C&P became well aware that some of its facilities would have to be discontinued in the old streets and reinstalled to conform

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[2] *Mumpower* v. *Housing Auth.*, 176 Va. 426, 452, 11 S.E.2d 732, 743 (1940).

[3] The testimony of Mr. Tucker and the graphic Exhibits 11-16 amply demonstrate the massive nature of the C&P facilities (A. 110-141). The cables were one to three inches in diameter, containing as many as 3,600 pair of wires (A. 102, 121), buried in conduits consisting of plastic pipe four inches in diameter, twenty feet long glued one to the other and encased in concrete when they crossed roadways (A. 112-115). The cables are ordered to exact lengths to fit the distance between specific manholes (A. 116), which have walls of concrete a foot thick, are roughly seven feet high, twelve feet long and six feet deep with two feet of dirt over the foot-thick roofs (A. 117-120). The cables have an estimated life of 40 years (A. 121) and when they are put in place they are expected to stay there that length of time (A. 122).

to the new street patterns. A cooperative effort was made by C&P, NRHA and the City of Norfolk to facilitate this removal (A. 167, 170-171, 219).

After the streets were closed and the new street patterns were established under the guidance of the City of Norfolk, C&P discontinued its lines in the old street beds. It left in place the massive conduits and structures which had been buried in the ground and withdrew from them the telephone cables which were then either junked or salvaged (A. 100, 101). As the new streets were built, C&P was permitted, under its franchise agreement with the City of Norfolk (A. 228), to relocate its facilities within the new street rights-of-way in the project areas. C&P paid nothing for the privilege of placing its lines in the new streets, just as it had paid nothing to place them in the old streets.

On May 4, 1975, C&P filed a claim for the non-betterment cost of reestablishing its lines in the new streets in the Rosemont Redevelopment Project, such work having been done between March of 1972 and December of 1974. This claim was a departure from established practice under the City franchise agreement pursuant to which relocations had been made at C&P expense (Stipulations 10 and 11, A. 43-44), and it was the first time any utility had claimed reimbursement from NRHA under the URA for relocation from public rights-of-way. Subsequently, C&P filed additional claims for work in other projects, the last claim being filed on August 17, 1977 (A. 265) When the C&P claims were denied by NRHA, an appeal was taken to the Richmond Area Office of HUD. On June 18, 1979, HUD issued a letter denying the C&P claims (A. 263).

Thereafter, on October 1, 1979, C&P filed a complaint in the United States District Court for the Eastern District of Virginia praying for a judgment declaring that C&P was eligible for relocation payments under the URA, for an order in the nature of a mandate ordering HUD

to direct NRHA to pay the C&P claim, and praying that the Court enter judgment against HUD and NRHA for the sum of $686,422.23, plus interest from the date the relocation work was actually done (A. 12-14).

On June 4, 1981, the United States District Court for the Eastern District of Virginia issued its memorandum opinion determining that C&P was not a "displaced person" as contemplated by the URA and was not entitled to the relief which it sought. An order to that effect was entered on the same date (A. 48, 62).

C&P appealed the decision of the District Court and on March 25, 1982, the United States Court of Appeals for the Fourth Circuit reversed the District Court and remanded the case for further proceedings consistent with its opinion (A. 63). A stay of the mandate was granted pending the filing of a Petition for a Writ of Certiorari to this Court. The Petition was filed June 22, 1982, and a Writ of Certiorari was granted on January 17, 1983.

SUMMARY OF THE ARGUMENT

Prior to the passage of the URA, the common law rule was that those utilities which placed their facilities in or under public ways pursuant to franchise agreements with state or local governments acquired no vested property interest, and had to remove or relocate those facilities at the expense of the utility company when requested to do so by the appropriate state or local government. This rule is of long standing, dating at least from 1905 when this Court decided *New Orleans Gaslight Co.* v. *Drainage District of New Orleans*, 197 U.S. 453 (1905). The rule was firmly established and well understood by the Congress when it passed the Federal-Aid Highway legislation in 1954, 1956 and 1958.[4]

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[4] Special Report 91, *Relocation of Public Utilities 1956-1966, An Analysis of Legal Aspects*, 3, Highway Research Board, Division of Engineering, National Academy of Sciences and National Research Council, National Academy of Engineering (referred to as Special Report 91).

After substantial debate and an intensive congressional study, which culminated in a 74-page report entitled *Public Utility Relocation Incident to Highway Improvement*, H.R. Doc. No. 127, 84th Cong., 1st Sess. (1955), Congress adopted the Federal-Aid Highway Act of 1956, Pub. L. No. 627, 87 Stat. 250, which, at Section 11, permitted the use of federal funds to reimburse a state (in the same proportion as federal funds were expended on the project) when the state paid the cost of utility relocation under the laws of that state. Thus, under Section 11 of the Federal-Aid Highway Act of 1956 (which became Section 123 of the Federal-Aid Highway Act of 1958, 72 Stat. 89, Pub. L. No. 85-831) a pattern was established for using federal funds in reimbursement of payments made by a state which were not in violation of the state laws. No federal right of utility companies to receive payment was created. The common law of the several states was unchanged.

During the decade of the 1960's an intensive study was implemented by Congressional committees to provide the basis for legislation aimed at the elimination of inequities which resulted from the acquisition of real property by Federal and federally assisted programs, and the standardization of the relocation benefits for persons displaced by such acquisition.

The thrust of the legislation (the URA) which emerged from the studies and hearings in the sixties was to provide for fair and equitable treatment of persons displaced by acquisition of their homes, businesses and farms. The URA followed as closely as possible the relocation provisions of the Housing and Urban Development Act of 1968, Pub. L. No. 92-213, 85 Stat. 775, and the Federal-Aid Highway Act of 1968, Pub. L. No. 90-495, 82 Stat. 815, modifying them only for uniformity. Several provisions of the Federal-Aid Highway Act were repealed by the URA and their purposes were accommodated in the URA, but the provision which pertained to reimbursement to

states which paid utility relocation costs (Section 123) was neither repealed nor incorporated into the URA. The subject of relocating utility transmission lines from public rights-of-way was not addressed in the URA or in its legislative history.

Thus, after the URA became law, the following legal principles were in full force and effect:

(a) the common law of a great majority of the states required a utility to relocate at its expense where it occupied the public rights-of-way under a franchise;

(b) Section 123 of the Federal-Aid Highway Act permitted partial federal reimbursement to those states which paid relocation expenses if such payments were not in violation of state law or contract;

(c) HUD regulations declared that the payment of relocation costs to a private utility was an ineligible project expenditure unless required under state law; and

(d) the URA, which did not change any of the above.

The conclusion is inescapable that Congress had no intention of changing, and did not change, the common law as it pertains to reimbursement of utility relocation costs. This conclusion is consistent with the practice of the federal and local governments. None of the governmental units paid for such relocation without specific statutory authority, and there were no provisions for such payment in the rules governing relocation benefits which were published in the Federal Register or the Code of Federal Regulations.

In order to be eligible for benefits under the URA, C&P must demonstrate that it is a "displaced person" as defined in the statute. That portion of our argument which is summarized above demonstrates that, in respect to the relocation of its transmission lines, a utility was never contemplated by Congress as a displaced person. Even if this were not true, however, C&P could not recover.

C&P has failed to prove that it moved *personal property* as a result of the *acquisition of real property.*

The transmission facilities of C&P which are involved in this litigation are real property under the law of Virginia. The relocation of these C&P facilities was caused by a termination of its franchise by the closing of streets, and not as a result of the acquisition of real property by NRHA.

ARGUMENT

I. UNDER ITS FRANCHISE C&P ACQUIRED NO PROPERTY RIGHTS AND IS REQUIRED TO MOVE ITS FACILITIES FROM A PUBLIC RIGHT-OF-WAY AT ITS EXPENSE

A. The Franchise Ordinance

By ordinance adopted by the Council of the City of Norfolk, Southern Bell Telephone and Telegraph Company was given a franchise (the "Francise") to place, maintain and operate its wires and fixtures over and under the surface of public ways for the purpose of "transmitting communication by electricity". C&P has succeeded to the rights of Southern Bell and has placed its facilities in and under the public streets of Norfolk as needed to serve its subscribers. The rights given by the Franchise are non-exclusive and do not prevent the City from granting similar privileges to other individuals, and the City has reserved the right to amend, alter or repeal the ordinance at its pleasure without providing compensation for any damage which might result (A. 240-241).

Under this arrangement C&P has moved its lines without compensation whenever required to do so in accommodation of street improvements or alterations. (See Stipulation, Paragraphs 10 and 11, Final Pre-trial Order, A. 43-44; and Testimony of George W. Austin, Chief Highway Engineer for the City of Norfolk, A. 226).

B. The Applicable Law

The Supreme Court of Virginia, in *Potomac Electric Power Company* v. *Fugate*, 211 Va. 745, 180 S.E.2d 657 (1971), described the rights possessed by a utility company under such an arrangement as follows:

> This being true, we think the trial court accurately characterized the nature of the interests involved here when it ruled that the 'rights [the plaintiffs] have to place their facilities are not property rights [and they] would have to remove and relocate on request of the grantor in each case.' So what we are dealing with are mere licenses, revocable at will, permitting installation of the plaintiffs' utility facilities. . . . (Id. at 747)
>
> This argument, as the defendant points out, is certainly circular in nature and, moreover, overlooks the common law rule, recognized in Virginia, imposing upon a utility the burden of relocating facilities at its own costs when it occupies highway property under rights of the nature held by the plaintiff. . . . (*Id.* at 748)

This statement of the common law was accepted by the District Court below and was not challenged by the Court of Appeals for the Fourth Circuit. It is broadly recognized as the existing state of the common law.[5]

In *New Orleans Gaslight Co.* v. *Drainage Commission of New Orleans*, 197 U.S. 453 (1905), which involved gas lines which had to be moved to facilitate proper drainage in the city, the Court said:

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[5] *New Orleans Gaslight Co.* v. *Drainage Comm'n of New Orleans*, 197 U.S. 453, 461 (1905); *Artesian Water Co.* v. *State Dept. of Highways & Transp.*, 330 A.2d 432, 436 (Del. 1974); *Central Maine Power Co.* v. *Waterville Urban Renewal Auth.*, 281 A.2d 233 (Me. 1971); *Port of New York Auth.* v. *Hackensack Water Co.*, 41 N.J. 90, 195 A.2d 1 (1963); *State* v. *Idaho Power Co.*, 81 Idaho 487, 346 P.2d 596 (1959).

> The gas company, by its grant from the city, acquired no exclusive right to the location of its pipes in the streets, as chosen by it, under a general grant of authority to use the streets. The city made no contract that the gas company should not be disturbed in the location chosen. In the exercise of the police power of the state, for a purpose highly necessary in the promotion of the public health, it has become necessary to change the location of the pipes of the gas company so as to accommodate them to the new public work. In complying with this requirement at its own expense, none of the property of the gas company has been taken, and the injury sustained is *damnum absque injuria*. (*Id.* at 462)

The same principle was recognized in *Central Maine Power Co.* v. *Waterville Urban Renewal Authority*, 281 A.2d 233 (Me. 1971). In that case the utility company was required to bear the additional costs of underground installation instead of an aerial location. The Court treated this as the relocation of facilities in a public right-of-way and ruled that the municipality cannot reimburse a utility for its relocation expenses without "express authority from the legislature." (*Id.* at 236)

It was because of this rule of law that some states passed enabling acts specifically permitting reimbursement of utility relocation costs in highway construction situations in order to take advantage of the Federal-Aid Highway Act of 1956 under to which a utility company's relocation expenses could be reimbursed when such reimbursement was not violative of state law. Legislation was introduced in forty states to authorize such payments. Only twenty two of those bills were passed, however, and of those which were passed, six were vetoed by the governor of the state involved. However, that flurry of legislation subsided within a few years and by 1965 it was reported that the situation concerning reimbursement for utility relocation costs seemed to have stabilized.[6]

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[6] Special Report 91, *supra* note 4, at 3.

Some of the state laws permitting payment of utility relocation costs were challenged in court. Thus, the Supreme Court of Idaho in *State* v. *Idaho Power Co.*, 81 Idaho 487, 346 P.2d 596, (1959) declared that a state statute which authorized payment of relocation costs to utilities from the state highway fund as part of the cost of constructing a highway resulted in an unconstitutional invasion of the highway fund. In reaching its decision, the Idaho Court analyzed the legal rights involved and cited many authorities from other jurisdictions for the proposition that a utility company which places its facilities under the public streets acquires no property right thereby and must move them, without reimbursement, when directed to do so.

C&P has not challenged this principle of law, but in its arguments below has contended that there is a difference between the requirement to move from a street right-of-way for urban renewal purposes and the need to move because of a change in a street or highway for transportation or traffic rasons. There is no justification for such a distinction. The underlying principle in each case is that the utility company acquires a permission to use the street which is always subject to the police power of the state or local government to provide for the general welfare of its citizenry. If the general welfare requires a change in the arrangement of the utility's facilities, whether for traffic reasons,[7] drainage,[8] port development,[9] or the eradication of slums and blight under an urban

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[7] *Bell Telephone Co. of Pennsylvania* v. *Pennsylvania Public Utility Comm'n*, 139 Pa. Super. Ct. 529, 12 A.2d 479 (1940); *Hampton Roads Sanitation District Comm'n* v. *Chesapeake*, 218 Va. 696, 240 S.E.2d 819 (1978).

[8] *New Orleans Gaslight Co.* v. *Drainage Comm'n of New Orleans*, 197 U.S. 453 (1905).

[9] *Port of New York Auth.* v. *Hackensack Water Co.*, 41 N.J. 90, 195 A.2d 1 (1963).

renewal plan,[10] the utility must, under the common law, make the change at its expense.

II. THE DECISIONS WHICH HAVE HELD THAT THE URA DID NOT CHANGE THE COMMON LAW CONTAIN SOUNDER LOGIC AND A MORE CAREFUL ANALYSIS THAN THAT FOUND IN THE OPINION OF THE COURT OF APPEALS FOR THE FOURTH CIRCUIT

The contest here is whether or not the Congress abrogated the common law regarding payment of utility relocation costs when it enacted the URA. The Court of Appeals for the Fourth Circuit ruled that it did, while all of the other courts which have considered the question have ruled that it did not. The better analysis is found in the latter group of decisions.

A. The decision of the Circuit Court of Appeals for the Fourth Circuit

The heart of the decision of the Court of Appeals for the Fourth Circuit in this case, insofar as it applies to the intent behind the passage of the URA, may be found in the following language:

> Thus the Act was intended to extend benefits uniformly to persons who are displaced by federal acquisitions of real property for federal programs. Exclusion of utilities from the Act's coverage would run counter to that purpose.
>
> In the absence of any clear legislative intent to exclude utilities, it is this court's duty to apply the literal language of the statute. Doing so, we find that a utility comes within the Act's definition of 'business' and thus is a 'displaced person' under the Act (A. 70-71).

The URA was intended to bring uniformity to the application of *existing* laws, to follow the pattern set by

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[10] *Central Maine Power Co.* v. *Waterville Urban Renewal Auth.*, 281 A.2d 233 (Me. 1971).

the Federal-Aid Highway Act as closely as possible, and, above all, to provide assistance to individuals, particularly the poor and elderly, small businesses and farmers. The URA sought to eliminate *unfair* burdens on people who had no means to cope with the trauma of dislocation.[11] This rationale does not apply to a state controlled utility company which through the return allowed on its rate base routinely receives the revenues needed to fund the expected costs of relocation (Stipulation, A. 44).

Nor must utilities be *included* as beneficiaries under the URA in the absence of any clear legislative intent to *exclude* them, as was ruled by the Court of Appeals (A. 70). To the contrary, where there is intact a well recognized common law rule, the legislature must show a clear intent to *change* that rule, and a clear indication of what the new rule will be.[12] This was recognized by the other courts which have considered the question.

B. Other courts which have construed the URA have held that a utility company is not a "displaced person" with reference to the relocation of transmission facilities

The District Court below and those other courts which have construed the URA in circumstances similar to the case at bar have each read the URA in context with the settled common law. They have refused to abrogate the common law without specific statutory language requiring such a change.[13] The rationale is well stated by the Boise,

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[11] Sen. Rep. No. 91-488, 91st Cong., 1st sess. 6-8 (1969), Comments by Sen. Muskie.

[12] *Delaware River Port Auth.* v. *Pennsylvania Public Utility Comm'n*, 393 Pa. 639, 145 A.2d 172 (1958); *Port of New York Auth.* v. *Hackensack Water Co.*, 41 N.J. 90, 195 A.2d 1 (1963).

[13] *Artesian Water Co.* v. *State Dept. of Highways and Trans.*, 330 A.2d 432 (Del. 1974); *Pacific Telephone & Telegraph Co.* v. *Redevelopment Agency of Glendale*, 151 Cal. Rptr. 68, 87 Cal. App.3d 296 (1978); *Mountain States Telephone & Telegraph Co.* v. *Boise Redevelopment Agency*, No. 52891 (Dist. Ct. Idaho, Oct. 27, 1980),

Idaho court in *Mountain States Telephone & Telegraph Co.* v. *Boise Redevelopment Agency*, (Petition for Certiorari, Appendix C, pp. C-22, 23) as follows:

> The overwhelming common law view in this country is that public utilities are not entitled to reimbursement for costs incurred while relocating its equipment to make way for governmentally sponsored projects. The U.R.A., if it is held to reverse this well-established rule, is to be regarded as a statute in complete derogation of common law.
>
> > 'Unless clearly so stated and apparently and evidently so intended, a statute will not be construed to have changed common law.' (Citations omitted).
>
> Given the stated intent of Congress to unify and coordinate the various federal relocation assistance programs, the state of the common law, and the consequent failure of Congress to clearly provide for the needs of the public utilities and their relocation requirements, it is the opinion of this court that the U.R.A. was not intended to include within its coverage the reimbursement sought by the plaintiffs in this action.

C. This court refused a claim for relocation benefits under the "written order" clause of the URA which was based on the theory that the right supporting the claim was implied in the language of the URA

In *Alexander* v. *U.S. Department of Housing and Urban Development*, 441 U.S. 39 (1979) this Court construed the "written order" section of the URA.[14] There

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reprinted in Appellant's Petition for Certiorari at p. C-1; *Lone Star Gas Co.* v. *Landrieu*, No. 80-100-C (E.D. Okla. March 30, 1981), reprinted in Joint Appendix at p. 319; *National Fuel Gas Distribution Corp.* v. *Niagara Frontier Transp. Auth.*, Civil No. 78-843 (W.D.N.Y. Feb. 6, 1980).

[14] C&P makes no contention that the "written order" clause is applicable. There was no written order in this case.

the Court was called upon to interpret language which was broad enough, if literally construed, to permit two possible interpretations. This Court reviewed the statute and its legislative history and concluded that the more narrow construction was proper. The Court said:

> The structure of the Relocation Act confirms our conclusion that Congress did not expect to provide assistance for all persons somehow displaced by Government programs. The benefit provisions involved here are but one part of a comprehensive statute that also establishes the procedures agencies must follow when acquiring land for federal programs . . . . This placement in itself suggests that Congress was concerned with burdens related to Government acquisition of property, as opposed to a broader range of dislocation problems. . . . (p. 60)

In *Alexander*, this Court looked for indications from the Congress as to what the URA meant. For example, in construing the meaning of §§ 101(6), 202 and 205, this Court there held that the three sections should be given similar scope since there were no indications that Congress intended a different result.

Further, in deciding whether the acquisition of property by HUD at foreclosure constituted an "acquisition" within the meaning of § 101(6) of the URA, this Court held in *Alexander* that it did not, where there was no evidence that Congress intended to provide relocation benefits under circumstances which did not involve acquisition. (*Id.* at 65)

The New Jersey Supreme Court in *Port of New York Authority* v. *Hackensack Water Co.*, 41 N.J. 90, 195 A.2d 1, 11 (1963) sought to determine whether the legislature "has revealed" an intent to change the common law.

In contrast to the proper search for an *expression* of Congressional intent in *Alexander* and *Port of New York Authority*, the Court of Appeals permitted the C&P claim

because it was not specifically *excluded*. We submit this reverses the proper burden of persuasion.

D. The comparison of C&P's right to those of a tenant at will used by the Court below is not appropriate

> The Circuit Court of Appeals stated: HUD's reliance on the common law is unconvincing. The Act was intended to create rights that were not recognized at common law. A tenant at will, for example, can recover relocation expenses as a displaced person under the Act even though the common law recognized no such right. . . . (A. 68-69)

We agree that the URA created some rights which did not exist at common law. This occurred in those instances where the statute and its legislative history clearly manifested the congressional intent to make the change. Thus, the URA was effective to change the common law rights of tenants at will. Congress plainly manifested its intention to cover tenants who had no previous right to compensation. They were prominently and extensively the subject of public hearings and were often mentioned in the committee reports.[15] Finally, they were provided for in the URA under § 4624. The only condition for eligibility imposed by Congress is that the applicant must have been displaced from a dwelling which he "actually and lawfully occupied" for "not less than ninety days prior to the initiation of negotiations for acquisition of such dwelling." 42 U.S.C § 4624. There is no evidence of any intent by Congress to change the law as to utility relocation in the same manner as it did for tenants.

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[15] House Comm. on Public Works, Select Subcomm. on Real Property Acquisition of the House Committee on Public Works, 88th Cong., 2d Sess., Study of Compensation and Assistance for Persons Affected by Real Property Acquisition in Federal and Federally Assisted Programs 15-20 (Comm. Print 1965) (hereinafter Select Subcommittee Report).

This provision for a tenant (including a tenant at will) is consistent with the central thrust of the URA, which is to ameliorate the undue hardship on those individuals and families directly affected by the property acquisition. The tenants at will are generally poor, usually live in hovels unfit for human habitation, and are without the means of securing alternate housing. These people constitute a substantial portion of the tenants described in the Select Subcommittee Report,[16] which deals with the human disruption expected in Federal and federally assisted programs. When the home in which such a person lives is taken, the tenant must find another place and pay the rent demanded. When C&P is directed to move, it is given a new location and the relocation funds are both anticipated and provided for in its rate structure. Finally, it pays nothing for the new location.

E. If the cost of relocating its transmission lines is to be shifted away from C&P, a clear statutory mandate is required to change the existing common law

The Supreme Court of New Hampshire in *Opinion of the Justices*, 101 N.H. 527, 132 A.2d 613 (1957) upheld the constitutionality of a state statute passed to implement the relocation provisions of the Federal-Aid Highway Act of 1956. The Federal act specifically authorized reimbursement to a state which had paid costs to utilities in conformance with local law. The court said:

> Utility facilities are located within public highways with permission and license and are subject to reasonable regulation and control under the police power. *Bourget* v. *Public Service Company*, 98 N.H. 237, 97 A.2d 383, RSA 254: 19-23. Consequently, utilities are required to relocate their facilities at their own expense whenever public health, safety or convenience require change to be made. *Detroit Edison Co.* v. *City of Detroit*, 332 Mich. 348, 51 N.W.2d 245,

[16] *Id.* at 15, 16.

> *Jamaica Water Supply Co.* v. *New York*, 280 App. Div. 834, 114 N.Y.S.2d 79, affirmed 304 N.Y. 917, 110 N.E.2d 739; 12 McQuillin, Municipal Corporations (3rd ed.) §§ 34.74, 34.77. There "* * * has been no dissent from the common law rule as enunciated by numerous courts that, *in the absence of a clear statutory mandate* shifting the burden to the State, utilities are obliged to relocate at their own expense their facilities located in public highways when required to facilitate highway improvements." Public Utility Relocation Incident to Highway Improvement, House Document 127, p. 57 (84th Cong. 1st Session 1955). See also, RSA 254:23. (Emphasis added) (p. 614)

The Supreme Court of Pennsylvania in *Delaware River Port Authority* v. *Pennsylvania Public Utility Commission*, 393 Pa. 639, 145 A.2d 172 (1958) noted that utilities in that state historically occupied highway rights-of-way free of cost but subject to control and regulation under the police power. In such cases, property rights are acquired and the utilities can be ordered to relocate their facilities at their own expense. However, the Court conceded that this common law rule could be changed by a *specific statutory mandate* of the legislature. It then described the language required to effectuate such a change:

> A legislative intent to effect any departure from a firmly established policy of the law must be expressed in clear and unequivocal language. Well-settled and established principles of law are not to be regarded as changed unless the terms of the new legislation unmistakably and unambiguously indicate such a change. 'In the absence of express declaration, the law presumes that the act did not intend to make any change in the common law, for if the legislature had that design they would have expressed it.' (pp. 175-176)

The Court of Appeals for the Fourth Circuit was wrong when it changed the common law without a clear statu-

tory mandate from the Congress. *Norfolk & Western Railway Co.* v. *Virginian Railway Co.*, 110 Va. 631, 66 S.E. 863 (1910), *Shaw* v. *Merchants' National Bank of St. Louis*, 101 U.S. 557 (1880) and *Port of New York Authority* v. *Hackensack Water Co.*, 41 N.J. 90, 195 A.2d 1 (1963). The Virginia rule (which follows the common law) is that the utility must move when directed by local authority, and must itself bear the costs of such relocation. There is no clear mandate in the NRA to change the common law.

III. THE LEGISLATIVE HISTORY OF THE URA DOES NOT SUPPORT THE CLAIM BEING ASSERTED BY C&P

Congress became involved in the problems of persons displaced from real property as early as 1935.[17] After World War II, there was an expansion of acquisition of property by various federal or federally-assisted programs, including the massive federal interstate highway system. Various methods of assistance were devised and in 1961 the House Public Works Committee established the Select Subcommittee on Real Property Acquisition. The charge to the Select Subcommittee[18] was to

> make a comprehensive, impartial and nonpartisan study in order to determine whether owners, tenants, and other persons affected by the acquisition of real property in Federal and federally assisted programs receive fair and equal treatment, and adequate compensation, considering the value of their property and the losses and expenses they incur on being required to move from their homes, farms, or business locations.

The comprehensive Select Subcommittee Study was completed in 1964. It contained recommendations for

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[17] Tennessee Valley Authority Act of 1933, ch. 32, 48 Stat. 58, as amended, 49 Stat. 1080.

[18] Select Subcommittee Report, *supra* note 15, at 1.

uniformity in land acquisition procedures and provisions for relocation assistance to persons displaced by the acquisition. The Summary and Conclusions of the Select Subcommittee Study emphasized the accelerated pace of acquisition by Federal and federally-assisted programs; the substantial losses and expenses suffered by owners and tenants which were not covered by market value concepts of just compensation; the plight of residential tenants and small businesses; the burdens on low or moderate income families, the elderly and the non-white displacees; the special problems of small businesses which are sometimes forced out of business; the lack of financing and counseling for the unsophisticated displacees; the judicial precedents which limit compensation to market value standards; the variances in existing Federal and federally-assisted programs and the need for uniformity in those programs; and the need for simplified procedures to obtain reimbursement for tenants and property owners.[19]

After the Select Subcommittee filed its report in 1964, two related measures were adopted by the 90th Congress: the Federal-Aid Highway Act of 1968 and the Housing and Urban Development Act of 1968. The Highway Act mandated certain relocation assistance to those displaced by the Federal-Aid Highway system, but made no change in the existing provisions of Section 123 pertaining to utility relocation. The Housing and Urban Development Act supplemented relocation assistance in housing and urban renewal programs. All of this was recited as part of the background for S.1, the Senate version of the URA. (S. Rep. No. 91-488, 91st Cong. 1st Sess. [1969]). The Committee report described the purpose of the proposed legislation as follows:

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[19] Select Subcommittee Report, *supra* note 15, at 105-113.

> In large part, S. 1 is designed to permit the Federal government to *deal consistently and fairly* with all those whose property is taken for public projects and all those who are displaced from their homes and their businesses. It follows as closely as possible the substantive provisions of the Housing and Urban Development Act and the Federal Highway Act, modifying them only as necessary to achieve a system of requirements and aids that can be applied uniformly in all Federal and federally assisted programs. (S. Rep. No. 91-488, 2) (Emphasis added)

The House report, H.R. Rep. No. 91-1656, 91st Cong., 1st Sess., (1970) stressed uniform and equitable treatment.

> As the thrust of Federal and federally assisted programs have shifted from rural to urban situations, it became increasingly apparent that the application of traditional concepts of valuation and eminent domain resulted *in inequitable treatment* for large numbers of people displaced by public action. When applied to densely populated urban areas, with already limited housing, the result can be catastrophic for those whose homes or businesses must give way to public needs. The result far too often has been that a few citizens have been called upon to bear the burden of meeting public needs.
>
> . . .
>
> The bill as recommended is necessary to *eliminate the great inconsistencies* that exist among Federal and federally assisted programs with respect to the amount and scope of payments, other assistance provided, and assurances of housing offered. It recognizes that relocation is a serious and growing problem in the United States and that the pace of displacement will accelerate in the years immediately ahead. It recognizes that advisory assistance is of special importance in the relocation process especially for the poor, the nonwhite, the elderly, and people engaged in small business. It recognizes the

need for more equitable land acquisition policies in connection with the acquisition of real property for these programs. In short, this legislation recognizes that the Federal Government has a primary responsibility *to provide uniform treatment* for those forced to relocate by Federal and federally aided public improvement programs *and to ease the impact* of such forced moves.

This legislation refines and strengthens the basic principles and programs in S. 1. as passed by the Senate. It provides *a humanitarian program* for relocation payments, advisory assistance assurance that comparable, decent, safe, and sanitary replacement housing will be available for displaced persons prior to displacement, economic adjustments, and other assistance to owners and tenants displaced from their homes, farms, and places of business. It establishes a uniform policy on real property acquisition practice for all Federal and federally assisted programs. And, perhaps most important of all, it gets to the heart of the dislocation problem by providing the means for positive action to increase the available housing supply for displaced low and moderate income families and individuals. (Emphasis added) (Reprinted in 1970 U.S. Code Cong. & Admin. News 5851-5852)

Applying these concepts to the C&P claim produces no reason for allowing the claim. *Uniformity* as to utility relocation already existed. Utilities remove their lines without compensation absent a state statute to the contrary. There is no unfairness or any "shattering effect" on C&P by reason of the urban renewal program. Its state approved rate structure already provided monies to move the lines, and C&P has moved its lines for public purposes without reimbursement ever since it obtained its Franchise. If the legislature intended to shift the burden of relocation costs from the customers of the utilities it

would do so only after the type of extensive debates which took place in the several states after passage of the Federal-Aid Highway Act.[20]

The legislative history of the URA stresses the impact of relocation on individuals, on small businesses and the poor. Nowhere do the committee reports evidence a discussion of the relocation of utility lines. This is remarkably different from the legislative history of the Federal-Aid Highway statute, where utility relocation was directly discussed and included in the legislation.

A different result would be obtained if C&P were claiming moving expenses for the cost of moving its furniture or equipment from an office building it owned or leased and which was being acquired under a Federal or federally assisted project. In that situation C&P would qualify for relocation benefits. It is a person under § 4601(5). It would have moved personal property as the result of the acquisition of real property. There would be no countervailing common law rule requiring a different result. Under this hypothetical, the literal language of the statute would apply and C&P would be entitled to relocation benefits.

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[20] In S. Rep. No. 1407, 85th Cong., 2d sess. 28 (1958), the committee, after reviewing the legislative actions in the several states said:

> **The committee did not contemplate this drastic change in existing practices when the 1956 act was enacted, and realizes that the use of Federal funds for reimbursement to the State for this purpose will increase substantially, thereby reducing the amount of Federal funds available for construction of highways.**

IV. IN CONTRAST TO THE ABSENCE OF EVIDENCE OF CONGRESSIONAL INTENT TO PROVIDE REIMBURSEMENT FOR UTILITY RELOCATION IN THE URA, THE FEDERAL-AID HIGHWAY ACT AND ITS LEGISLATIVE HISTORY DEMONSTRATE A CLEAR INTENT TO PERMIT REIMBURSEMENT FOR UTILITY RELOCATION UNDER CERTAIN CIRCUMSTANCES

In the committee reports preceding adoption of the Federal-Aid to Highway Acts of 1954 and 1956, specific mention was made of the problems involved in utility relocation caused by the highway program. This is in stark contrast to the absence of any such discussion in the decade during which the URA was under careful and extensive consideration in the House and the Senate.

Senate Report No. 1093, Mar. 25, 1954 (to accompany S. 3184), reprinted in 1954 U.S. Code Cong. and Admin. News, 2162 recites, at page 2174 the following:

> UTILITY RELOCATIONS
>
> The Committee heard considerable testimony from owners and operators of various public utilities concerning the heavy financial burden placed upon them when reconstruction or modernization of highways requires that their facilities be moved from their prior locations on the highway right-of-way. It was stated that in some instances the relocation expense represented such a large proportion of their total capital investment that they would be forced out of business, thereby depriving large numbers of customers from needed services. In other cases it was stated that they would have to make large increases in the rates charged to their customers.
>
> In most instances, these utilities are occupying the public highway rights-of-way by sufferance, and it appears that they receive some advantage because of the convenience of the existence of the highway as a means of access for maintaining and servicing their facilities. The utilities are now seeking legislation

in the Federal-Aid Act which would require that they be reimbursed for relocation of their facilities, either wholly or in part from Federal funds.

The data presented at the hearings seem to show that some inequity does exist in the assessment of utility relocation costs under present conditions. The testimony does not indicate, however, what, if any, responsibility might be attributed to the Federal Government for this situation. On the contrary, it appears that such inequities as may exist arise *largely because of the relationships between the utilities and the State and local governments* which own or control the highway rights-of-way.

Under existing Federal-aid law, the Federal Government can and does reimburse the States for the Federal matching share of the cost of construction of Federal-aid roads. If the State, pursuant to its own laws and regulations, is able to certify that utility relocation expense is a proper charge to the construction cost of a highway, then that expense is included in the total construction cost for which the State is reimbursed by the Federal Government to the extent of the Federal share, which is basically 50 percent of the total cost. *If, however, because of inhibitions in its laws and regulations, the State is unable to certify utility relocation expense as a proper charge to the highway-construction cost, then there is no avenue under existing Federal-aid law by which any Federal funds could be applied toward meeting the relocation expense.*

It is clear that such inequities as may exist are due to relationships between the utilities and the State or local governments rather than relationships with the Federal Government. It would seem *neither feasible nor desirable for the Federal Government to give direction to those local relationships by force of application of Federal funds.* Furthermore, no evidence was presented as to any attempt to resolve the local relationships among the parties directly involved. (Emphasis added)

No action on this subject was taken in 1954. Instead, a study was authorized and its findings were reported to the Congress in April, 1955.[21] Thereafter, in the Federal-Aid Highway Act of 1956, a specific provision was adopted authorizing Federal reimbursement to the states when a state made relocation payments permitted under state law.[22] The General Assembly of Virginia then enacted a statute authorizing payment of utility relocation costs in the Interstate Highway System in cities and towns. (Va. Code § 33.1-55, formerly § 33-36.9)

Thus, the General Assembly of Virginia effectively changed the common law rule and permitted payment of utility relocation costs in specified and limited instances involving Federal highway projects. This enabled Virginia to take advantage of the federal reimbursement available under the Federal-Aid Highway Act. If the Congress and the General Assembly, in adopting the Federal and state versions of the URA, had intended to further amend the common law so as to permit payment for utility relocation in other than highway construction, they would have made express provision therefor.

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[21] H.R. Doc. 127, 84th Cong., 1st Sess. (1955).

[22] Section 11 of the Federal-Aid Highways Act of 1956 (later § 123 of the Federal-Aid Highway Act of 1958) provides:

> (a) When a State shall pay for the relocation of utility facilities necessitated by the construction of a project on the Federal-aid primary or secondary systems or on the Interstate System . . . Federal funds may be used to reimburse the State for such costs in the same proportion as Federal funds are expended on the project. Federal funds shall not be used to reimburse the State under this section when the payment to the utility violates the law of the State or violates a legal contract between the utility and the State. . . .

V. THE ADMINISTRATION OF THE URA BY FEDERAL AGENCIES AND THE SUBSEQUENT ACTION OF CONGRESS SUPPORT THE CONTENTIONS OF NRHA

A. The agencies

The URA has a very wide scope of application.[23] When the instant suit was filed, at least twenty Federal agencies were involved in administering the fifty or more programs affected under the URA, yet none of the regulations promulgated by those agencies authorized the payment of benefits to utility companies for relocating their transmission lines.[24]

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[23] Senator Muskie stated in 1969 that "there are more than 50 Federal Programs which result in the condemning of land and, literally, the bulldozing of hundreds of thousands of people from their homes and businesses each year." Sen. Rep. No. 91-488, *supra*, Note 11, at 6.

[24] The federal agencies or departments and the respective regulations involved are: Department of Agriculture, 7 CFR Part 21 (1981); Department of the Army, 32 CFR Part 641 (1981); Department of Education, 34 CFR Part 15 (1981); Department of Health and Human Services, 45 CFR Part 15 (1981); Department of Housing and Urban Development, 24 CFR Part 42, (1981); Department of the Interior, 41 CFR Part 114-50 (1981); Department of Justice Property Management Regulations, 41 CFR Part 128-18 (1981); Department of Labor, 29 CFR Part 12 and 29 CFR Part 91 (1981); Department of the Navy, 32 CFR Part 742 (1981); Department of Transportation, 49 CFR Part 25 (1981); Economic Development Authority, 13 CFR Part 308 (1981); Environmental Protection Agency, 40 CFR Part 4 and 40 CFR Part 30.405-2 (1981); Federal Highway Administration, 23 CFR Part 740 (1981); General Services Administration, 41 CFR Part 101-18 (1981); National Oceanic and Atmospheric Administration, Department of Commerce, 15 CFR Part 916 (1981); Pennsylvania Avenue Development Corporation, 36 CFR Part 904 (1981); Soil Conservation Service, Department of Agriculture, 7 CFR § 652 (1981); Tennessee Valley Authority, 18 CFR Part 1306 (1981); United States Postal Service, 39 CFR Part 777 (1981); and Veterans Administration, 38 CFR Part 25 (1981).

During hearings conducted by the House Committee on Public Works, Mr. Richard Van Dusen, then Under Secretary of HUD, testified on behalf of his agency in support of the URA. He cited HUD's extensive experience in relocation dating back to 1956. Mr. Van Dusen outlined the statutory changes in the Housing and Urban Development Acts of 1968 and 1969. He noted that in 1969 alone HUD spent $44 million to assist 21,600 families, almost 18,400 single persons and more than 9,000 business concerns. He referred to an administrative regulation limiting business relocation benefits to $25,000.00 and noted relocation payments from December, 1965 through June of 1969 to 34,355 businesses, of which about 400 filed claims for expenses exceeding $25,000. Nowhere in this extensive description of HUD experience in relocation was there any mention of payments in reimbursement of utility relocation costs. Hearings before the Comm. on Public Works House of Representatives 14898, H.R. 14899, S.1 and related bills, 91st Cong., 1st & 2d Sess. (1969-1970) 1025-1029, 1034-1035.

The HUD Urban Renewal Handbook RHA, Sec. 7209.1 which was in effect before passage of the URA (and which was not amended in this respect after passage of the URA) specifically disallows relocation benefits to a utility unless authorized by state law. (The HUD regulations are printed as Appendix A in the Amicus Brief filed by the City of Boise, Idaho, *et al.* in support of the Petition for Certiorari. The provision relating to private utility lines is printed at p. 63 of Appendix A.) The current HUD regulations which appear at 24 CFR § 2.1 *et seq.* contain no provision for or reference to eligibility of a utility for reimbursement for removing its transmission lines from the public right-of-way.

B. Inconsistent Congressional action

It is manifest that the Congressional Committees which studied the problem and then recommended adoption of the URA were intimately familiar with the provi-

sions of the Federal-Aid Highway Acts of 1954, 1956, 1958 and 1968. The Senate Committee on Government Relations described S.1 as following the Federal-Aid Highway Act as closely as possible (S.Rep. No. 91-488, 91st Cong., 1st Sess. 2, 1964). When the URA took its final form it repealed the relocation assistance provisions of Chapter 5 of the Highway Act and incorporated them into the URA. Yet it retained Section 123 of that chapter which dealt with utility relocation. This manifested an intent by Congress to leave unchanged the law relating to utility relocation costs.[25]

Further corroboration of the fact that Congress, in passing the URA, did not intend to provide private utility companies any relocation benefits is demonstrated by a subsequent development in the Congress. The District of Columbia Redevelopment Land Agency was classified as a "state agency" in § 101(3) of the URA. Accordingly, the relocation activities of the urban renewal projects of that agency are governed by the URA. On October 14, 1972, Congress enacted the District of Columbia Public Utilities Reimbursement Act of 1972, P.L. No. 92-495, 86 Stat. 812 (1972), specifically providing for the reimbursement of utility relocation costs caused by an urban redevelopment project carried out by the District of Columbia Redevelopment Land Agency. This action by Congress demonstrated that the URA had not authorized such reimbursement, for if it had, Public Law No. 92-495 would have been unnecessary.

In H.R. Rep. No. 92-906 92d Cong., 2d Sess. (1972), the Committee on the District of Columbia specifically noted that without the enactment of the District of Columbia Public Utilities Reimbursement Act, utility relocation costs would be borne by the utility's consumers saying:

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[25] *Artesian Water Co.* v. *State Dept. of Highways & Transp.*, 330 A.2d 432 (Del. 1974).

> Section 2 of the H.R. 13533 would amend the District of Columbia Redevelopment Act of 1945 to require payment by the RLA of the cost of relocating, adjusting, replacement, removing, and abandoning utility facilities whenever such actions become necessary because of an urban redevelopment plan or modification thereof. Payment of such costs would be made to the utility owning such facilities and would be treated as an allowable cost of the Urban Renewal redevelopment project.
>
> Generally in the District of Columbia, costs incident to the removal or relocation of electric, telephone, and gas utility facilities, when such removal or relocation is necessitated by governmental action, have been borne by the public utilities affected thereby. This long-standing requirement is based on the view that utility companies acquire no vested interests in the public space of the District of Columbia by the grant to them of franchises to construct and maintain utility lines, conduits, pipes, and related facilities. Hence, when the needs of the District or Federal governments so require in connection with the construction of public buildings and other public works, such utilities are now obliged to remove, divert, or relocate their facilities without cost to the respective governments.

The Committee recommended passage of the proposed legislation and concluded with the following statement:

> Unless such relief is granted to the public utilities for the costs of relocating or abandoning their facilities, such costs must eventually be passed on to the users of the utilities' services. This legislation would obviate added charges resulting from such projects, extraordinary property losses on facilities no longer used, and the higher costs brought about by expenses for relocation. H.R. Rep. 92-906, 8.

This action by the Congress was not directed at national legislation. It is analagous to the actions taken by many state legislatures following passage of the URA.

Its significance lies in the difference between the language used in the District of Columbia Act and the URA. The District of Columbia Act intended to and did deal with the cost of utility relocation in urban renewal projects. This is the type of specific language which is required to change the common law. It does not anywhere appear in the URA or in the Virginia version of that statute.

Further support for the NRHA position is found in an opinion of the Comptroller General of the United States dated September 15, 1971 and addressed to the Architect of the Capitol, The Honorable George M. White. Mr. White had received a request from Potomac Electric Power Company for reimbursement for relocation of its utilities from the public right of way incident to construction of the Library of Congress James Madison Memorial Building. The Comptroller General recommended denial of the claim, noting the general rule that utilities must relocate at their expense when required to do so by the government, and recognizing the need for specific statutory authority to permit such payments. Even though this transpired after enactment of the URA, the Comptroller General stated he knew of no law which would justify payment of the PEPCO claim. (51 Comp. Gen. 167 [1971]).

VI. UNDER VIRGINIA LAW THE C&P FACILITIES INVOLVED IN THIS CLAIM ARE REAL PROPERTY, NOT PERSONALTY

C&P claims reimbursement for relocating its transmission cables and the massive conduits, concrete structures or telephone poles used to support them (its "facilities"). As a threshold requirement for benefit eligibility under the URA, C&P must "move [its] personal property from real property." 42 USC § 4601(6) Hence, C&P must demonstrate that its facilities are personal property. The question whether the facilities are real or personal prop-

erty is to be decided under the law of Virginia, the state where they are situated. *Humble Oil & Refining Co.* v. *Copeland*, 398 F.2d 364 (4th Cir. 1968).

These facilities meet the definitional requirements of "real property" as set out by the Supreme Court of Virginia in *Transcontinental Gas Pipe Line Corp.* v. *Prince William County*, 210 Va. 550, 172 S.E.2d 757 (1970). They are certainly annexed to the realty. They are adapted to the use to which the street beds are adapted.[26]

There was every intention of leaving these facilities under the ground indefinitely, because it was too expensive to change them around (A. 110-127, 140). Speaking to these requisites for the definition of real property, the Virginia court in *Transcontinental* said:

> In the present case the evidence shows that Transco's gas mains are buried in the ground, and thus annexed to the realty. The mains are adapted to the use of the property to which they are annexed, and they are essential to the purpose for which the perpetual easements were acquired and are used. Testimony that the gas mains could be used for a hundred years, because of the methods employed by Transco to preserve and protect them, clearly indicates that it was Transco's intention to permanently annex them to the land in which it has perpetual rights of way and easements.
>
> The fact that Transco reserved the right to remove the mains under the provisions of the right of way and easement agreements does not support the conclusion that the mains were not intended to become a part of the realty. The legal right to remove the mains is not synonymous with the intent to remove them. The gas mains are a permanent part of Transco's system and will remain in place for their

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[26] A utility is permitted to use the public way because it serves a public interest. *Port of New York Auth.* v. *Hackensack Water Auth.*, 41 N.J. 90, 195 A.2d 1, 4 (1968).

> normal life, subject only to the necessity of replacement, maintenance and repair. Thus it was clearly the intent of Transco to make the gas mains a part of the realty. (p. 556)

C&P recognized the force of *Transcontinental*, and wrote to the Commissioner of Revenue of the City of Norfolk asking that its facilities be classified for tax purposes as realty because they were realty under the law of fixtures (A. 292-293). We agree with C&P's conclusion on this point.

In the court below C&P relied on the decision of the Supreme Judicial Court of Maine in *Bangor-Hydro Electrict Co.* v. *Johnson, State Tax Assessor*, 226 A.2d 371 (Me. 1967). In that case the Court held that pole lines which were sold from Bangor-Hydro Electric Company (Bangor) to New England Telegraph and Telephone Company were personal property for the purposes of assessment of sales taxes. The Court noted that Bangor had the burden of proving tax exemption and thus ruled that the poles (made of logs which were personalty) had not become sufficiently annexed to the real estate to lose that character. The more persuasive reasoning is found in *Transcontinental, supra*, where the court recognized the accession of the pipe lines to the realty.

The Court of Appeals below added to the *Transcontinental* criteria for converting personal property to fixtures the additional requirement that the personalty must be installed or affixed to realty owned by the owner of the personalty. This is not the law of fixtures. Although it is true that Transcontinental Gas Pipe Line Corporation installed its lines in land over which it had acquired a permanent right-of-way, the decision in *Transcontinental* did not turn on that fact. The most that could be said of the effect of such ownership is that it resolved any doubt as to the owner's intention. (See, *Transcontinental*, 210 Va. at 556.)

The facilities are real property under Virginia law. Hence, C&P does not qualify as a "displaced person" because it did not move *personal* property as required under the URA.

VII. C&P DID NOT MOVE ITS TRANSMISSION LINES AS A RESULT OF THE ACQUISITION OF LAND

A second eligibility requirement which C&P must, but cannot, meet in order to be entitled to benefits under the URA is that it must move its personal property from real property "as a result of the acquisition of such real property." 42 USC § 4601(6) (Emphasis added)

A. C&P moved its facilities because of the requirements of the Franchise

The eradication of blight in Norfolk has been in progress for a long time. The successive redevelopment and conservation plans resulted from cooperative planning involving the City, NRHA, neighborhood associations, and advice from the citizenry by way of public hearings (A. 187-190). Mr. Tucker, the C&P field engineer in charge of the relocation activities, testified that C&P stayed in close touch with the progress of the urban renewal plans, and that he heard from the City about closing a street before he knew of it in any other way (A. 106).

No coercion was needed to make C&P move its facilities. C&P understood that it must move if the streets were closed or rearranged (A. 106-108, 219-216). The inherent nature of the Franchise dictated this result for two reasons: first, the Franchise specifically reserved to the City of Norfolk the right to alter (or eliminate) the privilege granted C&P without any liability (A. 241); and second, the rights given under the Franchise were always subordinate to the needs of the general public. Hence, the utility must always be ready to relocate its transmission lines at its expense. The same relationship was described as follows by the Supreme Court of New

Jersey in *Port of New York Authority* v. *Hackensack Water Co.*, 41 N.J. 90, 195 A.2d 1, 4 (1963):

> If the case turned upon a delegation of such power, we would find it, but we think the utilities misconceive the source of their obligation to relocate. That obligation does not originate in a specific order to relocate. Rather it antedates the occasion for relocation and rests upon the common law's view of the rights and responsibilities of the recipient of a so-called franchise to use the public streets. A utility company is permitted to locate its lines within the public right of way as a use ancillary to the principal and primary use of the way by the public. (citations omitted.) It is permitted to use the public way because it serves a public interest, but since its venture is for gain and since in any event the primary purpose of the public easement is the public' own use of it, the utility's interest in the public [illegible] is subordinate to the public's enjoyment of it. Hence the utility runs the risk that the public welfare may require changes in the road which will call for relocation of its facilities.

Furthermore, when any street is closed there is no longer any public way in which the utility can place its facilities, and the right to occupy the public space is terminated. *Holden* v. *New York State Telephone Co.*, 31 A.D.2d 812, 298 N.Y.S.2d 256 (1969).

Thus, it is manifest that it was the nature of the Franchise itself, not the acquisition of any real property, which caused C&P to move its facilities.

B. The acquisition of land in the several projects, having been completed well before C&P was required to move, did not cause the relocation of the C&P facilities

A recitation of the events which led up to the relocation of the transmission lines will establish that this relocation was not the result of the acquisition of the land.

Long after C&P had laid its lines in the public streets, urban renewal plans were adopted which contemplated the acquisition of land and the subsequent demolition of buildings in specified sections of the City. The acquisition and demolition was done by NRHA with federal funds. Thereafter, the cleared land was readied for redevelopment. Public works were installed and new streets were laid out to accommodate prospective new development by public or private enterprise (A. 181-208). Each step was separate and took its own time. The acquisition of and clearance of the land was done by NRHA, but the rezoning and street closings were done by the City.

In this manner NRHA acquired each parcel of land which was designated for acquisition under the urban renewal plans, including all those which abutted streets or portions of streets which were to be closed, re-routed or widened. Under Virginia law the acquisition of a parcel of land abutting a public street carries with it the fee simple title to the land beneath the street, extending to the centerline of the street, subject only to an easement in favor of the public for public use and travel. *Heller* v. *Woodley*, 202 Va. 994, 998, 121 S.E.2d 527 (1961).

While the closing of a street extinguishes the public right-of-way, it is neither a taking nor a damaging of any property interest. *City of Lynchburg* v. *Peters*, 145 Va. 1, 133 S.E. 674, (1926).

Thus the acquisition of the land in which C&P had installed its facilities was accomplished *bit by bit* by NRHA. Each deed conveying a parcel abutting the street carried with it the underlying fee to the centerline of the street, subject to the public easement. This impediment to the title was removed, like the release of a deed of trust, by the city ordinance closing the street. This street closure perfected the title to the land in NRHA, but it did not compel any action on the part of C&P. The utility had to move only if and when a *new and different*

street pattern was prepared and ready to receive C&P's new facilities.

The right C&P gained by its Franchise was the general license to place its lines in the public streets of the City of Norfolk. No particular location was guaranteed. The case here is much like the situation in *Consumers Power Co.* v. *Costle*, 615 F.2d 1147 (6th Cir. 1980), where the Circuit Court of Appeals for the Sixth Circuit ruled that no relocation benefits were proper when gas lines were moved from one location to another within a public right-of-way. In the instant case, C&P was only required to move from one portion of the public system of rights-of-way to another location in the same system. A new and completely adequate location was offered each time, and without cost to C&P.

The term "acquisition" as used in the URA is tantamount to a taking in eminent domain, or by a negotiated sale. House Report 91-1656, reprinted in 1970 U.S. Code Cong. & Admin. News 5850-5851, cites the nationwide growth of the economy and the increasing demand for public facilities and services. The Report then takes note of the fact that the acquisition of land which had provided "residential, commercial, or other services" had become "the most difficult facet of many undertakings of public agencies." *Id.*

Thus, the URA is aimed at alleviating disproportionate hardships resulting directly from the *acquisition of land.* The term "just compensation", related as it is to fair market value, was demonstrably not providing adequate payments to persons who had to move against their will. The URA was enacted to provide additional benefits to owners and tenants who had no other source of reimbursement. There was no demonstrated reason for Congress to come to the rescue of the utility companies—and the URA did not.

C&P has not met its burden of showing that it moved its facilities as a *result* of the taking of real property.

Having failed to meet this second threshold requirement of the URA, C&P's claim must be denied.

CONCLUSION

The Court of Appeals' interpretation of the URA shifts the burden of the cost of moving utility transmission lines from the subscribers of the utility company to the general taxpayers. It dramatically alters state law and practice by judicial fiat, without the benefit of public hearings and without the careful screening which is available through the legislative process. It superimposes on the finely tuned, but varied, body of state law a simplistic federal rule which does not take into account or accommodate the complexities of the judicial decisions, statutes and constitutions of the individual states. The decision below would impose on localities a financial burden which they certainly did not anticipate, and one which they never intended to accept. The result is contrary to the rule established by this Court in *Pennhurst State School and Hospital* v. *Halderman*, 451 U.S. 1 (1981).

The URA is an excellent example of remedial legislation which has performed its function well in the decade since its passage. However, there is no reason for the law to be interpreted now in a manner which drastically disrupts the settled laws and procedures which have developed over the years (both before and after the URA) on the subject of utility relocation. If the law on this important subject is to be changed, the change should be made by the legislature, not by an appellate court.

The briefs amicus which have been filed in support of the NRHA position attest to the fact that the harsh and adverse impact of the decision below will be nationwide if it is not reversed. Localities with older central business districts have widespread deterioration and an outdated infrastructure. The revitalization of these central business districts will predictably involve land acquisition

aided by federal funds. Mass transit facilities, central parking garages, new office buildings, and new hotels and convention centers will all require new land use patterns involving the closing, vacating and rerouting of streets. If the decision below is allowed to stand, funds available to assist in these improvements will be curtailed and directed to a use not contemplated by the Congress. Already strained municipal budgets will be further impacted by the unexpected payments to the utilities.

The opinion below departs from the accepted and usual course of judicial analysis and accordingly arrives at the wrong result. The decision of the Court of Appeals should be reversed and the C&P claim should be denied.

Respectfully submitted,

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In The

Supreme Court of the United States

OCTOBER TERM, 1982

NORFOLK DEVELOPMENT AND HOUSING AUTHORITY, A POLITICAL SUBDIVISION OF THE COMMONWEALTH OF VIRGINIA,

Petitioner,

v.

THE CHESAPEAKE AND POTOMAC TELEPHONE COMPANY OF VIRGINIA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF ON THE MERITS FOR RESPONDENT TELEPHONE COMPANY

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QUESTION PRESENTED

The one question decided below and presented here is whether a utility company is a "displaced person" within the meaning of the URA, (42 U.S.C. § 4601 *et seq.*) when it moves its utility lines from land which was formerly the bed of a public street but the absolute ownership of which, free from the public street easement, has been acquired by a local government agency for a federally-assisted urban renewal project, after which the company is not permitted by the acquiring agency to maintain and operate its facilities in the same location.

Petitioner's brief incorrectly describes the question presented as involving the removal of such lines "from public rights-of-way." No such question was presented to or decided by the courts below.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF AUTHORITIES iv

STATUTE INVOLVED vii

STATEMENT OF THE CASE 1

SUMMARY OF ARGUMENT 4

ARGUMENT 6

I. AS APPLIED TO THE FACTS OF THIS CASE THE STATUTORY LANGUAGE LEAVES NO ROOM FOR JUDICIAL INTERPRETATION 6

A. C&P Moved from Land Acquired for a Project; It Also Moved Its Personal Property and Discontinued and Moved a Business Operation from that Land .. 7

B. All of the Facilities Moved by C&P or Lost When C&P Discontinued Operation of Them Were Tangible Personal Property of C&P 9

C. C&P's Displacement Was a Result of NRHA's Acquisition of the Land Occupied By C&P's Equipment and a Direct Result of Projects Under Title I of the Housing Act of 1949 16

D. C&P Claims Payment For Only Those Expenses and Losses For Which Payments Are Specifically Required By §4622(a)(1)-(2) 16

E. The Absence of Specific Reference to Utility Relocation Is Not Significant 17

II. NOT ONLY THE WORDS OF THE URA BUT A CLEAR CONGRESSIONAL POLICY UNDERLYING OTHER ACTS OF CONGRESS REQUIRE APPLICATION OF THE URA TO RELOCATIONS OF UTILITY LINES BUILT IN STREETS 19

Page

III. THE URA SEEKS TO REMEDY BOTH THE INEQUITIES AND THE LACK OF UNIFORMITY IN THE TREATMENT OF DISPLACED PERSONS. FOR THOSE WHO PAY THE COST OF UTILITY SERVICES THE EFFECT OF GOVERNMENT PROGRAMS WAS AS LACKING IN UNIFORMITY AS IT WAS INEQUITABLE 23

IV. THE URA DOES NOT ABROGATE THE COMMON LAW RULE. IT ONLY PROVIDES FOR MITIGATION OF INEQUITIES WHICH RESULT WHEN THE RULE IS APPLIED TO A SINGLE CLASS OF SITUATIONS NEVER CONTEMPLATED WHEN THE RULE WAS BEING FORMULATED 24

V. THE QUESTION DECIDED BY THE COURT OF APPEALS HAS BEEN OTHERWISE DECIDED IN ONLY ONE CALIFORNIA INTERMEDIATE APPELLATE COURT, ONE IDAHO TRIAL COURT AND THE DISTRICT COURT BELOW, ALL ON MISTAKEN GROUNDS 25

VI. CONDITIONS AND LIMITATIONS OF MUNICIPAL FRANCHISE AGREEMENTS HAVE NO BEARING HERE 29

A. Legislation Requiring Reimbursement of Relocation Costs Could Not Unconstitutionally Impair Any Contractual Obligation of C&P to Relocate at Its Own Expense Since C&P's Franchise Imposed No Such Obligation 32

VII. IF THE COST OF RELOCATING UTILITY LINES BUILT IN STREETS IS NOT REIMBURSABLE UNDER §4622(a) SUCH FACILITIES MUST BE ACQUIRED WITH THE LAND UNDER §4652 WITH ANOMOLOUS CONSEQUENCES 33

VIII. THE POSITION OF THE OPPOSING *AMICI* IS INEQUITABLE 35

Page

A. There Can Be No "Retroactive" Effect Unjustly Imposing Unbudgeted Expense On Local Agencies And No "Windfall" or "Double Recovery" By Utility Companies 36

CONCLUSION 37

TABLE OF AUTHORITIES

Cases

Alexander v. *Dept. of HUD*, 441 U.S. 39, (1979) 7

Artesian Water Co. v. *State Dep't. of Highways and Transportation*, 330 A 2d 432 (Del. Super. 1974) aff'd 330 A 2d 441 (Del. 1974) 27, 28

Bangor-Hydro Electric Company v. *Johnson*, 226 A.2d 371 (Me. 1967) 10, 11, 14

Beaird-Poulan Division, etc. v. *Department of Highways*, 616 F.2d 255 (5th Cir. 1980), cert. den. 449 U.S. 971 (1980), rehearing denied 449 U.S. 1104 (1981) 19

Chambers v. *Roanoke I. Ass'n*, 111 Va. 254, 685 E. 980 (1910) 32

The Chesepeake & Potomac Telephone Co. v. *Landrieu, et al.*, 674 F.2d 298 (4th Cir. 1982) 3

City of Columbus v. *Indiana Bell Tel. Co.*, 152 Ind. App. 22, 281 N.E. 2d 510 (1972) 22

Consumer Product Co. v. *Costle*, 615 F.2d 1147 (6th Cir.) (1980) 8

Funeral Directors' Ass'n. v. *Groth*, 202 Va. 792, S.E. 2d (1961) 30

In Re City of Center Line, 387 Mich. 260, 196 N.W. 2d 144 (1972) 22

Lone Star Gas Co. v. *Landrieu*, No. 80-100C, (E.D. Okla. 1981) 27, 28

Mayor and City Council of Baltimore v. *Baltimore Gas and Electric Co.*, 221 Md. 94, 156 A 2d 447 (1959) 23

Missouri Pacific R. Co. v. *City of Topeka*, 213 Kan. 658, 518 P. 2d 372 (1974) 22

Mountain States Tel. and Tel. Co. v. *Boise Redevelopment Agency* (Dist. Ct., 4th Dist. of Idaho, 1980) 26, 27

Page

Mumpower v. *Housing Authority*, 176 Va. 426, 115 F.2d 732 (1940) 31

National Fuel Gas Distribution Corp. v. *Niagra Frontier Transp. Auth.* Civil No. 78-843 (W.D.N.Y. 1980) 27, 28

New Orleans Gaslight Company v. *Drainage Commission*, 197 U.S. 453 (1905) 24

Newport Electric Corp. v. *Redevelopment Agency of Newport*, 116 R.I. 22, 351 A 2d 590 (1976) 22

Norfolk & Portsmouth Tract. Co. v. *Norfolk*, 115 Va. 169, 78 S.E. 545, 547 .....30, 31

Owensboro v. *Cumberland Tel. & Tel. Co.*, 230 U.S. 58, 68 (1915) 29, 30, 32

Pacific Tel. & Tel. Co. v. *Redevelopment Agency of Glendale*, 87 Cal. App. 3d 296, 151 Cal. Rpt. 68 (1978) 25, 27

Richmond v. *Smith*, 101 Va. 161, 166 43 S.E. 345 (1903) 29

Roanoke v. *Michael's Bakery Corp.*, 180 Va. 132, 21 S.E.2d 788 (1942) 15

Sanitation Commission v. *Chesapeake*, 218 Va. 698, 240 S.E. 2d 819 (1978) 24

South Central Bell Tel. Co. v. *City of Chattanooga*, 578 S.W. 2d 950 (Tenn. app. 1978) 22

Southwestern Bell Tel. Co. v. *City of Fayetteville*, 271 Ark. 630, 609 S.W. 2d 914 (1980) 23

Transco Corp. v. *Prince William County*, 210 Va. 550, 172 S.E.2d 757 (1970) 9, 13, 14

United Electric Light Co. v. *Deliso Const. Co.*, 187 Mass. 500, 52 N.E.2d 553 (1943) 11, 14

Vermont Gas Systems, Inc. v. *City of Burlington*, 130 Ve. 75, 286 A 2d 275 (1971) 22

Whitman v. *State Highway Commission of Missouri*, 400 F.Supp. 1050 (W.D. Mo. 1975) 19

CONSTITUTION

Constitution of Virginia §168 and §171 15

STATUTES

Page

23 U.S.C. §123 ..... 20, 23
42 U.S.C. §1453 36
42 U.S.C. §4601 ..... 5, 6, 7, 8, 9, 18, 19, 35
42 U.S.C. §4621 6
42 U.S.C. §4622 ..... 7, 8, 9, 17, 34, 35
42 U.S.C. §4624 18
42 U.S.C. §4631 36
42 U.S.C. §4637 ..... 5, 7, 16
42 U.S.C. §4652 ..... 33, 34
17 Delaware Code §132(b)(5) 28
District of Columbia Public Utilities Reimbursement Act of 1972, P.L. No. 94-495 ..... 20, 23

FEDERAL REGULATIONS

24 CFR §42.221 36

MISCELLANEOUS

Code of the City of Richmond §27-25 23

STATUTE INVOLVED

FROM U.S.C. Title 42:

Section 4621:

The purpose of this subchapter is to establish a uniform policy for the fair and equitable treatment of persons displaced as a result of Federal and federally assisted programs in order that such persons shall not suffer disproportionate injuries as a result of programs designed for the benefit of the public as a whole.

Section 4622:

(a) Whenever the acquisition of real property for a program or project undertaken by a Federal agency in any State will result in the displacement of any person on or after January 2, 1971, the head of such agency shall make a payment to any displaced person, upon proper application as approved by such agency head, for—

(1) actual reasonable expenses in moving himself, his family, business, farm operation, or other personal property;

(2) actual direct losses of tangible personal property as a result of moving or discontinuing a business or farm operation, but not to exceed an amount equal to the reasonable expenses that would have been required to relocate such property, as determined by the head of the agency; * * *

Section 4601:

As used in this chapter—

(5) The term "person" means any individual, partnership, corporation or association.

(6) The term "displaced person" means any person who * * * moves from real property, or moves his personal property from real property, as a result of the acquisition of such real property * * * for a program or project undertaken by a Federal agency, or with Federal financial assistance * * *

(7) The term "business" means any lawful activity, excepting a farm operation, conducted primarily

* * *

(B) for the sale of services to the public;

* * *

Section 4637:

A person who moves or discontinues his business, or moves other personal property, or moves from his dwelling on or after January 2, 1971, as a direct result of any project or program which receives Federal financial assistance under title I of the Housing Act of 1949, as amended, or as a result of carrying out a comprehensive city demonstration program under title I of the Demonstration Cities and Metropolitan Development Act of 1966 shall, for the purposes of this subchapter, be deemed to have been displaced as the result of the acquisition of real property.

Section 4630:

Notwithstanding any other law, the head of a Federal agency shall not approve any grant to, or contract or agreement with, a State agency, under which Federal financial assistance will be available to pay all or part of the cost of any program or project which will result in the displacement of any person on or after January 2, 1971, unless he

receives satisfactory assurances from such State agency that—

(1) fair and reasonable payments and assistance shall be provided to or for displaced persons, as are required to be provided by a Federal agency under sections 4622, 4623, and 4624 of this title; * * *

Section 4631:

(c) Any grant to, or contract or agreement with, a State agency executed before January 2, 1971, under which Federal financial assistance is available to pay all or part of the cost of any program or project which will result in the displacement of any person on or after January 2, 1971, shall be amended to include the cost of providing payments and services under sections 4630 and 4655 of this title. * * *

Section 4652

(a) Notwithstanding any other provision of law, if the head of a Federal agency acquires any interest in real property in any State, he shall acquire at least an equal interest in all buildings, structures, or other improvements located upon the real property so acquired and which he requires to be removed from such real property or which he determines will be adversely affected by the use to which such real property will be put.

(b)(1) For the purpose of determining the just compensation to be paid for any building, structure, or other improvement required to be acquired by subsection (a) of this section, such building, structure, or other improvement shall be deemed to be a part of the real property to be acquired notwithstanding the right or obligation of a tenant, as against the owner of any other interest in the real property, to remove such building, structure, or improvement at

the expiration of his term, and the fair market value which such building, structure, or improvement contributes to the fair market value of the real property to be acquired, or the fair market value of such building, structure, or improvement for removal from the real property, whichever is the greater, shall be paid to the tenant therefor.

(2) Payment under this subsection shall not result in duplication of any payments otherwise authorized by law. No such payment shall be made unless the owner of the land involved disclaims all interest in the improvements of the tenant. In consideration for any such payment, the tenant shall assign, transfer, and release to the United States all his right, title, and interest in and to such improvements. Nothing in this subsection shall be construed to deprive the tenant of any rights to reject payment under this subsection and to obtain payment for such property interests in accordance with applicable law, other than this section.

Docket No. 81-2332

In The

Supreme Court of the United States

OCTOBER TERM, 1982

NORFOLK DEVELOPMENT AND HOUSING AUTHORITY, A POLITICAL SUBDIVISION OF THE COMMONWEALTH OF VIRGINIA,

Petitioner,

v.

THE CHESAPEAKE AND POTOMAC TELEPHONE COMPANY OF VIRGINIA,[1]

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

RESPONDENT'S BRIEF ON THE MERITS

STATEMENT OF THE CASE

Petitioner's Statement of the Case includes reference to the fact that some of the relocated utility lines involved in C&P's claims were moved from land in conservation projects where "acquisition of land * * * was infrequent and

[1] A wholly owned subsidiary of American Telephone and Telegraph Company.

selective (Petitioner's Brief, p. 3)." This suggests that some of the relocations affected by the decisions of the courts below may have involved the removal of utility lines from land which had not been acquired by NRHA for redevelopment and use for purposes other than any further use by the general public as a street. This is not the case.

Although it is true that a few of the claims filed by C&P did include removal of some facilities from land in conservation projects, the proceedings below did not reach the point of determining whether or in which instances such land had been acquired by NRHA, or whether particular facilities moved from land not so acquired were moved as the result of the acquisition of other land on which C&P conducted its business activities. Also some of the claims included the cost of moving small portions of a telephone line from land which remained a public street, in cases where an entire line built wholly within one street had to be moved because the land in that street had been acquired for redevelopment but portions of the same line crossed intersecting streets which were not closed. A third exceptional category involved lines which were moved from one location to another within the same street, either as it previously existed or as enlarged for the project. Whether the URA supports portions of C&P's claims falling in any of these exceptional categories has not been considered or decided by either the trial court or the Court of Appeals below.

The trial court, pursuant to its order directing a bifurcated trial (A 34) and in order to determine first "the issue of liability," held an initial trial and on the evidence there presented decided only the question whether C&P was entitled to relocation payments for relocation from land which had formerly been in streets but which, at the time

of the relocation had been acquired and was solely and exclusively owned by NRHA (A 4-7). The trial court did not consider or decide any other question. After concluding that the URA did not apply to any of the claims of a utility company on these facts it was unnecessary for the District Court to determine whether, under the additional circumstances of claims falling in the exceptional categories mentioned above, the particular facilities there involved also had been moved as the result of an acquisition of real estate for the project or as a direct result of a project receiving Federal financial assistance under Title I of the Housing Act of 1949 as amended, within the meaning of the URA.

The decision of the Court of Appeals was expressly limited to the question of payment for the relocation of utility lines where, as the court said,

> * * * NRHA became the owner of the land formerly dedicated to use as streets without the burden of that servitude.
> * * * (674 F.2d 298, 301 (1982), A 73)

The Court made plain that it did not decide any of the questions which would be presented upon a consideration of the individual items of C&P's claims in the exceptional cases involving the removal of some facilities from land the complete and exclusive ownership of which had not been acquired by NRHA. As to these questions the Court said:

> **Some of the removal expense was incurred with respect to lines in streets that were to be widened and other streets which were only partially closed. The record is not sufficient to permit us to decide whether those expenses resulted in whole or in part from the federal acquisition. This should be the subject of further consideration on remand. (*Id.*)**

At another point Petitioner's statement of the case asserts that the filing of C&P's claims "was a departure from established practice under the City franchise agreement pursuant to which relocations had been made at C&P's expense (Stipulations 10 and 11., A. 43-44), and it was the first time that any utility had claimed reimbursement from NRHA under the URA for relocation from public rights-of-way." (Petitioner's Brief, p. 5). This suggests that C&P and other utility companies have at their own expense moved utility lines from land which had formerly been occupied by City streets and thereafter acquired by NRHA for HUD-financed redevelopment projects *since the effective date of the URA* without making such claims. This fact has never been alleged or shown by any evidence or stipulation and would be denied if alleged. Petitioner's statement here suggests also that the relocations involved here and in pre-URA cases were made "pursuant to" C&P's city franchise agreement, which is certainly not true. All of the relocated utility lines dealt with by the decision of the court of appeals below were moved from land no longer subject to a public street easement so that the city no longer had any authority or control over the use of the land and the municipal franchise no longer had any application to it.

In all other respects this Respondent accepts the statement of the case made in Petitioner's Brief on the Merits.

SUMMARY OF ARGUMENT

The question here presented is answered by the plain terms of the Act itself.

The URA defines the class of individuals, corporations and other "displaced persons" entitled to its benefits, and specifies the benefits to which they are entitled, in language as broad and comprehensive as the declared purpose of the

Act. The statutory language directly applicable to C&P's claims is not susceptible of any interpretation which would exclude such claims.

The Petitioner, the *amici* supporting its position and now HUD, since the latest reversal of HUD's position before the courts in this case, argue that Congress must have intended something less than the plain import of the language of Sections 4601(5) through (7)(B) and 4637, but they can point to nothing in the Act or in its legislative history which in any way supports that contention.

In respect of the expenses and losses imposed on those directly involved in dislocations of people and their activities resulting from large scale acquisitions of land for government programs, the URA requires recognition and payment of designated elements of such loss and expense as part of the cost of the program or project, to be borne by federal and state or local taxpayers as are all other costs of the public improvement, notwithstanding the fact that such costs are not recoverable under any other law.

For those who pay the cost of utility service the burden of an increase in that cost made necessary by a governmental program or project is indistinguishable from the burden imposed on those who ultimately bear the increased cost of any other business activity when it must be moved for like reason, and in both cases the people so affected have no right under any other law to be compensated for the loss and expense thus imposed on them.

The opposition to such a law and to the decision of the Court below is supported by nothing more than the political expediency of financing part of the cost of public improvements by hidden taxes in the form of increased utility rates affecting people who receive no special benefit from the

improvement. No rational or equitable justification for doing so can be suggested. The Court of Appeals correctly refused to revise and amend this Act of Congress by reading into it an exception to the unqualified language of its express terms.

ARGUMENT

I. AS APPLIED TO THE FACTS OF THIS CASE THE STATUTORY LANGUAGE LEAVES NO ROOM FOR JUDICIAL INTERPRETATION

As stated in HUD's Brief in Opposition to the Petition for Certiorari "the court of appeals cannot be said to have erred in following the Act's plain language" (Fed. Resp. Br. in Opp. 7).

The Act mandatorily requires reimbursement of the relocation expenses and losses, and provision of the other relocation benefits specified in Subchapter II, to all "persons displaced as a result of Federal and federally assisted programs" (§ 4621). By providing that "person" means not only an individual but "any partnership, corporation or association" (§ 4601(5)) the Act makes plain that the people entitled to its benefits are not only those individuals who are themselves displaced and must bear alone the cost of moving but also all of the people who together share the cost so imposed on a displaced corporation or other organization, large or small. The Act makes equally clear that any such person is "displaced" if that "person" moves * * * or moves his personal property from real property as a result of the acquisition of such real property * * * for a program or project" (§ 4601(6)), or if that "person" "moves or discontinues his business, or moves other personal property * * * as a direct result of any project or program which receives Federal assistance under Title I of

the Housing Act of 1949, as amended" (§ 4637). And finally the Act makes plain that in referring to the moving or discontinuance of a "business" it does not mean the displaced person's total business operation but "any lawful activity * * * conducted primarily for" one of several enumerated purposes specifically including "the sale of services to the public" (§ 4601(7)).

To every such "person" the Act requires payment for "(1) actual reasonable expenses in moving himself, his family, business, farm operation, or other personal property; (2) actual direct loss of tangible personal property as a result of discontinuing a business or farm operation * * * (§ 4622(a)(1)-(2)).

The language of these provisions is in no way capable of being read as having two or more possible meanings, as was true of the patently ambiguous language of the "written order clause" of which this Court said:

> "the statutory language is susceptible of either construction" *Alexander* v. *Dept. of HUD*, 441 U.S. 39, 49 (1979).

A. C&P Moved From Land Acquired for a Project; It Also Moved Its Personal Property and Discontinued and Moved a Business Operation From That Land

HUD's brief argues that the telephone cables removed from the land acquired were not "moved" within the meaning of §§ 4601 and 4622 because they were not used as part of the relocated lines but used to recover their salvage value and so reduce the cost of the move. Under this view of the law any displaced person in such circumstances would be eligible for relocation payments only if he deliberately wasted the salvage value of property not suitable for use in the location to which he moves and claimed the

payments required by § 4622(a)(2). The language of the Act nowhere suggests, and no conceivable legislative policy could possibly justify, any such interpretation of these provisions.

HUD argues also that C&P did not itself move from the land acquired, mistakenly stating at page 31 of its brief that "C&P does not suggest that it has moved itself." C&P not only suggests but insists that it did so. The reference in § 4601 to "any person who * * * moves from real property" and in § 4622(a)(1) to reimbursement for "expenses in moving himself," are part of an act which defines "person" as including any partnership, corporation or association. From these two sections read together the conclusion is inescapable that an organization which discontinues a business or nonprofit activity on the land acquired and re-establishes it elsewhere is a "person who * * * moves from" such real estate and must be paid for the cost of "moving himself, his * * * business, farm operation or other personal property" under § 4622(a)(1).

Petitioner's contention that most of C&P's facilities were not personal property but real estate is separately discussed *infra* pages 9 *et seq.* In addition to this Petitioner argues that C&P should not be regarded as having moved or moved its facilities because it was able to relocate its lines in other public streets. From this Petitioner argues that relocation benefits under the URA are no more available than if C&P had merely been required to relocate its lines within existing streets which continued to be public streets, as in the case of *Consumer Product Co.* v. *Costle*, 615 F.2d 1147 (6th Cir. 1980), to which the URA could not be applied because there was no acquisition of real estate for the project and where the program or project did not receive Federal assistance under the Housing Act of 1949.

Petitioner's argument here would lead to a totally impossible interpretation of §§ 4601 and 4622. It only happens to be true that in this case the Federally assisted project was one in which the acquisition of land formerly available for delivery of utility services was accompanied by the creation or continuation of other streets usable for the same purpose. Application of the URA to claims like those of C&P must be the same whether this happens to be true or, on the contrary, the program or project involves the acquisition of a large tract from which all public streets and highways are eliminated, as in the case of a large military establishment, so that utility lines built in former streets must be moved to any available new rights-of-way on either public or private property. The fact that C&P here was able to move to other streets is totally irrelevant to any possible construction of the URA.

B. All of the Facilities Moved by C&P or Lost When C&P Discontinued Operation of Them Were Tangible Personal Property of C&P

It is not the law of Virginia or of any other state that utility lines built in public streets are real property. The materials used to construct such facilities in the streets were undeniably tangible personal property when they were brought to the construction site. The question whether such facilities continue to be personal property or become real property when constructed upon or physically affixed to the land is governed by the fundamental rule of property law clearly stated by the Virginia Supreme Court in *Transco Corp.* v. *Prince William County*, 210 Va. 550, 172 S.E.2d 757 (1970), hereinafter discussed, and by the Supreme Court of Maine in deciding a case which directly involved the precise question raised by the Petitioner here and

squarely held that such facilities remain the tangible personal property of the utility company.

In *Bangor-Hydro Electric Company* v. *Johnson*, 226 A.2d 371 (Me. 1967), the court held that electric power lines and telephone lines built in public streets by utility companies pursuant to their respective franchises remained personal property the sale of which was subject to a sales tax imposed on sales of personal property only. In doing so the court said:

> The test to determine whether personal property becomes part of real estate by accession, composed from Maine case law may be expressed as follows: Except in cases of trespass * * * *a chattel is not merged in the realty, unless* (1) it is physically annexed, at least by juxtaposition, to the realty or some appurtenance thereof, (2) it is adapted to the use to which the land to which it is annexed is put, or the chattel and the real estate are united in the prosecution of a common enterprise, *and* (3) *it was so annexed with the intention on the part of the person making the annexation to make it a permanent accession to the realty*, . . . which intention is not the hidden secret intention of the party making the annexation, but the intention which the law deduces from such external facts as the structure and mode of attachment, the purpose and use for which the annexation has been made and the relation and use of the party making it. . . .
>
> Applying this test, we find nothing in this report sufficient to persuade a finder of fact that the reference utility poles became part of the real estate by accession. They remain tangible personal property and come within the purview of the [sales and use tax] "Act."

(228 A.2d at p. 378. Emphasis supplied.)

In view of Petitioner's reliance on the fact that C&P's facilities were once treated as real property for local property tax purposes the decision in *Bangor-Hydro* is peculiarly significant by reason of the fact that for purposes of local property taxes the utility lines involved in that case were classified and taxed as real property. An Act of the Maine legislature dealing generally with local real estate taxes and other taxes on property expressly declared that "real estate, for the purposes of taxation, shall include . . . lines of electric light and power companies." The court held, however, that this provision should be construed as treating the utility lines as real property only for purposes of local property taxes.

The status as personal property of utility lines installed in a public street under a franchise has been questioned in one other reported case, and there again it was squarely held that telephone facilities of precisely the kind involved in this case are tangible personal property of the telephone company and did not become part of the real estate on which they were constructed or installed. In *United Electric Light Co.* v. *Deliso Const. Co.*, 187 Mass. 500, 52 N.E.2d 553 (1943), the plaintiff telephone Company had installed its underground conduits and cables in a public street and the defendant construction company, under contract with the city, had built a sewer beneath the telephone lines. The contractor had forced into the soil surrounding the sewer a liquid material which would harden to protect the sewer. Some of this material found its way into the telephone company's conduits, effectually destroying them. In the telephone company's suit against the contractor for this damage to the telephone lines the telephone company failed to prove that the contractor had been guilty of any negligence

and under Massachusetts law was limited to a claim of trespass by direct invasion of the plaintiff's property. In sustaining the trespass claim the Massachusetts court said:

> The plaintiff's manholes and conduits could be found to have been lawfully laid in the public way in accordance with permits duly granted in 1900 and 1921 by the proper municipal authorities to whom that power had been granted by Rev. Laws, c. 122, §2, G.L. c. 166, 22. . . . The plaintiff by virtue of the permits secured the privilege of sharing in a common right, the enjoyment of which was in the public at large, and the participation in this common right by the plaintiff by constructing and maintaining its structures for the use of the public, or that portion thereof that desired to use the facilities furnished by the plaintiff, did not impose an additional servitude upon the way for it was a use of the way that was included within the purposes for which it was taken, laid out and constructed. The rights of the owners of the lands abutting the way, although they owned the fee, were not impaired by the installation and maintenance of this underground system. [Citing authorities.]
>
> The permits did not give the plaintiff any title or proprietary interest in that part of the way that was occupied by its structures, and if the city acting under the power of eminent domain changed the grade of the way or even discontinued it, the plaintiff would have no claim for damages, even if it sustained a loss of these structures which could not be removed without destroying them. [Citing authorities.]
>
> The plaintiff, although without any proprietary interest in the land, and notwithstanding its allegation that the manholes and conduits constituted 'the plaintiff's close,' was the owner of the equipment which it had installed in the way. *This equipment did not become a part of the realty but was the personal property of the plaintiff* which remained in its custody and pos-

session. . . . (52 N.E.2d at pp. 555-6. Emphasis supplied.)

Nothing inconsistent with this view of the law is to be found in any decision of the Supreme Court of Virginia. In *Transco Corp.* v. *Prince William County,* 210 Va. 550, 172 S.E.2d 757 (1970), the gas mains held to have become real estate had been installed by the pipeline company on land which it owned outright or in which it owned a permanent right to use the land for the continued maintenance and operation of its lines—a right which is itself real property—an interest in the land itself for which it would be entitled to just compensation in the event of any taking of this land for public use. For this stated reason, and on precisely the same principles on which the Maine and Massachusetts cases held that utility lines in streets are personal property, the Virginia court held that Transco's lines had become part of the real estate:

> Three general tests are applied in order to determine whether an item of personal property placed upon realty becomes itself realty. They are: (1) annexation of the property to the realty, (2) adaptation to the use or purpose to which that part of the realty with which the property is connected is appropriated, and (3) the intention of the parties. *The intention of the party making the annexation is the chief test to be considered* in determining whether the chattel has been converted into a fixture. *Danville Holding Corp.* v. *Clement,* 178 Va. 223, 232, 16 S.E.2d 345, 349 (1941); *Green* v. *Phillips,* 67 Va. (25 Gratt.) 752, 759 (1875).
>
> * * *
>
> In the present case the evidence shows that Transco's gas mains are buried in the ground, and thus annexed to the realty. The mains are adapted to the use

> of the property to which they are annexed, and *they are essential to the purpose for which the perpetual easements were acquired and are used.* Testimony that the gas mains could be used for a hundred years, because of the methods employed by Transco to preserve and protect them, clearly indicates that it was Transco's intention to permanently annex them *to the land in which it has perpetual rights of way and easements. * * * Thus it was clearly the intent of Transco to make the gas mains a part of the realty.* (210 Va. at pp. 555-6. Emphasis supplied.)

An exactly opposite intention being equally if not more apparent when a telephone company installs its lines in public streets, where the company has no property interest in the real estate and no permanent right of any continued use of it, the Virginia court could not, consistently with the entire rationale of its decision in *Transco,* do otherwise than follow the decisions of other courts in cases such as *Bangor-Hydro* and *United Electric Light Co.*

Petitioner relies upon the fact that in 1972 counsel for the Company successfully claimed that the decision in *Transco* v. *Prince William* required classifying all of C&P's lines, whether on its own land or easements or in the streets, as real property for purposes of local property taxes in Norfolk, where the real property tax rate was lower than the tangible personal property tax rate. In accepting this view of the law, both C&P's attorney and the Commissioner of the Revenue ignored the fact that some of C&P's lines were in public streets. Also they may have been understandably misled by the fact that Virginia statutory and constitutional provisions dealing with property taxes use the terms "tangible personal property," "personal property tangible in fact," "intangible personal property" and "real property" in a highly specialized technical sense, in that

property which as a matter of property law clearly belongs to one of these kinds may be classified by the legislature and taxed as property which for all other purposes quite as clearly belongs to another of these classes. This has been the settled law of Virginia since the decision in *Roanoke* v. *Michael's Bakery Corp.*, 180 Va. 132, 21 S.E.2d 788 (1942), upholding the right of the state to tax as "intangible personal property" the delivery trucks of a manufacturing company notwithstanding the constitutional provision that "no State property tax for State purposes shall be levied on real estate or tangible personal property" and the further constitutional mandate that "Real state and tangible personal property . . . are hereby segregated for, and made subject to, local taxation only. . . ." (Constitution of Virginia § 171.) Since the time of the Michael Bakery decision it has been clear that § 168 of the Constitution, providing that "The General Assembly may define and classify taxable subjects," permits the legislature to classify property belonging to one of these kinds as belonging to another for property tax purposes. This alone can explain the fact that, as C&P's letter to the Commissioner of the Revenue reflects, the City had always taxed as real property the station equipment of the company (telephone instruments and other equipment which the company leases to its customers) in spite of the fact that such equipment was in fact tangible personal property for all other purposes. (A 292-3, A 158-9.)

It is therefore clear that the telephone equipment moved by C&P or lost when operation of it was discontinued was tangible personal property within the meaning of that term as used in the URA and as universally understood in the law of property.

C. C&P's Displacement Was a Result of NRHA's Acquisition of the Land Occupied By C&P's Equipment and a Direct Result of Projects Under Title I of the Housing Act of 1949

Petitioner's brief correctly states that its "acquisition of the land in which C&P had installed its facilities was accomplished *bit by bit*" (Pet'r's Br. 37), by first acquiring the abutting landowner's title and then procuring adoption of ordinances extinguishing the public street easement. After this acquisition had been completed NRHA alone, and neither the State, the City, nor any private person could either permit or forbid continued use of the land to deliver utility service to the public. Thus, NRHA alone granted such permission in the case of the electric power line described in Exhibit No. 33 (A 295), and withheld it in the case of C&P's facilities (Stipulation, A 45).

It is therefore not only "arguable," as HUD's brief concedes, but undeniable that C&P's move was a result of the land acquisition. It is equally undeniable that it was a direct result of urban renewal projects as specified in § 4637.

D. C&P Claims Payment For Only Those Expenses and Losses For Which Payments Are Specifically Required By § 4622(a)(1)-(2)

HUD's brief at page 42 states that "it is difficult to be certain what the $686,422.53 claim tendered by respondent encompasses" and that "It appears, however, that this sum represents primarily the cost to respondent of constructing its substitute lines." This statement seriously misdescribes C&P's written claims, which have been delivered to and reviewed by HUD and from which HUD's Regional Office has determined that

> "although we have not conducted an exhaustive engineering review of line items claimed * * * it appears that the expenses have been properly incurred, accounted and presented." (A 266)

Because of the bifurcated trial the written claims are not part of the record in this case but HUD and the Solicitor General appearing for it cannot now deny that all of C&P's claims are either (1) for the actual cost of moving equipment *less credits for its salvage value* or (2) for the cost of rebuilding relocated facilities *less credit for the previously realized value, represented by the previously expired portion of its useful life, of the old facilities abandoned, and less a further credit for "betterments" where the new facilities built are larger or involve greater expense than duplicating the old ones.*

C&P's claims are thus strictly confined to the payments required by § 4622(a)(1)-(2).

E. The Absence of Specific Reference to Utility Relocation is Not Significant

Consistently with its broad purpose the Act carefully defines the class of "displaced persons" entitled to its benefits in comprehensive terms which include innumerable distinct categories of such persons not specifically mentioned.

Undoubtedly the largest single category of displaced persons intended to be protected and included in the statutory definition consists of the displaced tenants of rented property who have to move because their short term leases expire between the time when the lessor's interest is acquired and the time when they are evicted. The operative provisions of the Act requiring reimbursement of the moving expenses of any displaced persons nowhere mention

holdover tenants or tenants at will or by sufferance, and throughout the entire subchapter providing for relocation benefits of all kinds the word "tenant" is never used in the text of the Act. That word is to be found only in the caption of 42 U.S.C. § 4624, affording special benefits, in addition to reimbursement of moving expense, to persons displaced from dwellings which they do not own but have occupied for ninety days or more before the acquiring agency first moved to acquire the property. In most cases such persons undoubtedly will be tenants occupying the property under a lease, but the text of this section makes it equally applicable to every "displaced person," as previously defined by 42 U.S.C. § 4601, who has "actually and lawfully occupied" such a dwelling for at least ninety days before the commencement of negotiations for its purchase, whether under a lease, by revocable permission of the owner or as squatters under an invalid claim of some right to do so.

After defining "displaced person" as including any corporation, partnership or association affected in the manner specified by the other terms of the definition the Act does not specifically mention any of the infinitely varying kinds of relocation which may result when a company must move its business operation or its movable property from land acquired for a government project or from other land as the result of a government acquisition of land on which the company conducts a business operation. It does not, for example, mention relocation of a telephone company's central office equipment from leased premises after acquisition of the office building for a government project, in which case Petitioner necessarily admits that the URA would require reimbursement for its relocation costs (Petitioner's Brief 24).

Nor does the Act mention relocation of a chain saw manufacturer's plant from land not acquired for the project resulting from acquisition of other land held by the company for plant expansion, as in the case of *Beaird-Poulan Division, etc.* v. *Department of Highways,* 616 F.2d 255 (5th Cir. 1980), cert. den. 449 U.S. 971 (1980), rehearing denied 449 U.S. 1104 (1981) and it does not mention the relocation of billboards constructed by an outdoor advertising company on land acquired for a highway improvement project, under agreements with the former landowner which may or may not have created any leasehold or other property interest in the signboard company, as in the case of *Whitman* v. *State Highway Commission of Missouri,* 400 F.Supp. 1050 (W.D. Mo. 1975).

Most if not all of the relocations for which reimbursement is required, and most if not all of the individuals, corporations, partnerships and associations plainly intended to be benefitted, are mentioned in the Act only by use of the broad but wholly unambiguous language of 42 U.S.C. § 4601 defining "person" and "displaced person." Denial of its application to relocations of persons or businesses of any one kind can never be justified by the absence of any specific mention of it in the Act.

II. NOT ONLY THE WORDS OF THE URA BUT A CLEAR CONGRESSIONAL POLICY UNDERLYING OTHER ACTS OF CONGRESS REQUIRE APPLICATION OF THE URA TO RELOCATIONS OF UTILITY LINES BUILT IN STREETS

In other legislation dealing directly with the special burden imposed on utility companies and their customers when utility lines built in streets or highways must be relocated as the result of federally financed programs Congress has

done literally everything within its power to provide for reimbursement of the relocation cost as part of the cost of the project.

In Section 123 of the Federal-Aid Highway Act of 1968, 23 U.S.C. § 123, Congress dealt with relocations of utility lines for construction of Federal-Aid Highways and provided for payment of the cost of moving such lines as part of the cost of the project unless such payment "violates the law of the State or violates a legal contract between the utility and the State" (*Id.*) To the extent of the Federal share, which in the case of interstate highway projects was 90% of the project cost, Congress thus recognized and afforded relief against the inequity of imposing on utility ratepayers this part of the cost of a national highway system.

When this legislation was enacted neither the URA nor Chapter 5 of the Federal-Aid Highway Act, both dealing with displacement by acquisitions of land for a project, was in effect. When the URA superseded and repealed Chapter 5 of the Highway Act, § 123 was left in force, reaffirming the Congressional policy of affording such relief to utility companies and their customers regardless of whether the displacement results from a land acquisition.

In the District of Columbia Public Utilities Reimbursement Act of 1972, P.L. 94-495, Congress specifically required reimbursement of those who move utility lines for either Federal-Aid highway projects or urban redevelopment projects in the District of Columbia, whether from land acquired for the highway or redevelopment project or within an existing street being rebuilt as part of the Federal-Aid Highway System or as part of a redevelopment plan.

From the fact that some of these District of Columbia relocations would be the result of an acquisition of land for the project Petitioner and HUD argue that Congress did

not consider the URA to be applicable to any of them. They do not explain how the same legislative body could intend to treat differently utility companies and their customers so affected by urban renewal or highway projects in the District of Columbia and others identically affected by similar projects elsewhere. There can be no rational basis for asserting that Congress has adopted one Congressional policy for those who support the cost of utility services delivered through streets of the District of Columbia and an exactly opposite policy for those who support such systems elsewhere.

The legislative policy of these two other Acts of Congress is irreconcilable with anything other than the plain import of the broad language of the URA.

III. THE URA SEEKS TO REMEDY BOTH THE INEQUITIES AND THE LACK OF UNIFORMITY IN THE TREATMENT OF DISPLACED PERSONS. FOR THOSE WHO PAY THE COST OF UTILITY SERVICES THE EFFECT OF GOVERNMENT PROGRAMS WAS AS LACKING IN UNIFORMITY AS IT WAS INEQUITABLE

Before enactment of the URA federal programs requiring utility relocations had widely varying effects throughout the nation on consumers of utility services delivered through public streets and highways, the entire cost of such relocations being imposed on some of them and none of it on others identically affected by such programs.

Wholly disparate treatment of people similarly situated resulted from differences in state law from one state to another, from federal and state legislation dealing only with programs of particular kinds and from administrative practices according one treatment to the consumers who pay with their utility bills the cost of a system owned and op-

erated by a public service corporation and an opposite treatment to those who similarly support an identical system owned and operated by a municipality or other public agency. Such disparity sometimes resulted from municipal ordinances and policies of some cities diametrically opposed to those in others.

The inequity of imposing on utility ratepayers part of the cost of a program from which they receive no benefit other than the benefit to the whole public, for which they pay their proper share in taxes, has been recognized and corrected by state law in at least seven states.

In Michigan, Vermont and Rhode Island state statutes which, like the URA, nowhere specifically mention payment for relocating utility lines built in streets but provide in general terms for the execution of urban renewal projects, are construed as requiring such payment wherever utility lines are relocated for such a project. *In Re City of Center Line,* 387 Mich. 260, 196 N.W. 2d 144 (1972); *Vermont Gas Systems, Inc.* v. *City of Burlington,* 130 Ve. 75, 286 A 2d 275 (1971); *Newport Electric Corp.* v. *Redevelopment Agency of Newport,* 116 R.I. 22, 351 A 2d 590 (1976). In Tennessee and Kansas state statutes expressly require payment for relocations of utility lines built in streets when required for urban renewal projects. *South Central Bell Tel. Co.* v. *City of Chattanooga,* 518 S.W. 2d 950 (Tenn. app. 1978); *Missouri Pacific R. Co.* v. *City of Topeka,* 213 Kan. 658, 518 P. 2d 372 (1974). In Indiana a statute which in terms merely authorizes payment for such relocations is held to entitle the utility company to demand it. *City of Columbus* v. *Indiana Bell Tel. Co.,* 152 Ind. App. 22, 281 N.E. 2d 510 (1972). And in Arkansas the common law rule generally treating such relocation costs as part of the cost of utility service is not followed except in a

narrow class of cases. *Southwestern Bell Tel. Co.* v. *City of Fayetteville*, 271 Ark. 630, 609 S.W. 914 (1980).

Ratepayers receiving utility service from systems owned and operated by public agencies are exempt from utility relocation costs by the rules and practices of HUD in administering urban renewal programs (paragraph 9 of Stipulation, A 43). Those served by utility lines moved from streets in the District of Columbia, whether as the result of land acquisition or solely as the result of reconstruction of streets in redevelopment project areas, are similarly exempted by the District of Columbia Public Utilities Reimbursement Act of 1972, *supra*, and those served by systems relocated for interstate highway projects are exempted in the sixteen states which have taken advantage of Section 123 of the Federal-Aid Highway Act, *supra*.

In the City of Baltimore a municipal ordinance authorizes, and is held by the Supreme Court of Maryland to require, payment by the redevelopment agency for moving utility lines in the execution of urban renewal projects, *Mayor and City Council of Baltimore* v. *Baltimore Gas and Electric Co.*, 221 Md. 94, 156 A 2d 447 (1959), and in Richmond, Virginia a general ordinance precludes the closing of any street occupied by utility lines at the request of either a private citizen or a governmental agency unless the cost of any resulting utility relocation is paid by the person or public agency requesting that the street be closed.[1]

[1] Unless otherwise specifically provided, whenever any street, alley or other public way is vacated or abandoned by the city at the request of any private individual, association, corporation or public authority, the cost of the relocation or removal of public utility facilities located in such street, alley or other public way shall be paid by the private individual, association, corporation or public authority requesting such vacation or abandonment. (Code of the City of Richmond §27-25)

The absence of a nationally "uniform policy for fair and equitable treatment of persons displaced as a result of Federal and federally assisted programs" was nowhere more conspicuous than in the cases of those who "suffer disproportionate injuries" by having to pay the cost of moving utility lines "as a result of programs designed for the benefit of the public as a whole."

IV. THE URA DOES NOT ABROGATE THE COMMON LAW RULE. IT ONLY PROVIDES FOR MITIGATION OF INEQUITIES WHICH RESULT WHEN THE RULE IS APPLIED TO A SINGLE CLASS OF SITUATIONS NEVER CONTEMPLATED WHEN THE RULE WAS BEING FORMULATED

The common law rule established in the landmark case of *New Orleans Gaslight Company* v. *Drainage Commission,* 197 U.S. 453 (1905) and widely followed in cases like *Sanitation Commission* v. *Chesapeake,* 218 Va. 698, 240 S.E. 2d 819 (1978), was developed in cases which involved utility line relocations for public improvements of the kind normally undertaken and financed by state and local governments, usually for the benefit of the same people served by the utility system affected.

This common law rule is equally applicable whether the change in the use of the public right-of-way is made by rebuilding the roadway for the benefit of the traveling public, or by making it more useful for other street uses, such as the delivery of other utility services. but both the primarily intended and the most widespread application of the rule assuredly has been to prevent interference with local improvements undertaken by local governments.

For all such cases the URA in no way changes the effect of the common law rule. The URA requires reimbursement

for the cost of such relocations only when the relocation is made necessary by federally sponsored and financed programs undertaken to serve national needs or local needs pervasive throughout the nation, and in no way does the URA impair the authority of any state or local government to require that utility lines built in public streets be rearranged or removed for the public good, or otherwise to regulate and control the use of land dedicated to public use.

It is true that the rule has been extended to cases in which the relocation results from an exercise of the power to acquire property and thereafter accomplish governmental objectives by exercising the proprietary rights of a landowner rather than by an exercise of purely regulatory powers, but this is an exceptional application of the rule not originally or primarily contemplated when the rule was being developed. The URA has only provided relief against some of the unjust and anomalous consequences of its application to this comparatively new class of cases arising out of the massive use of federal funds to finance national programs.

V. THE QUESTION DECIDED BY THE COURT OF APPEALS HAS BEEN OTHERWISE DECIDED IN ONLY ONE CALIFORNIA INTERMEDIATE APPELLATE COURT, ONE IDAHO TRIAL COURT AND THE DISTRICT COURT BELOW, ALL ON MISTAKEN GROUNDS

Petitioner's brief states that "all of the other courts which have considered the question" decided by the Court of Appeals below have decided it differently (Petitioner's Brief 13). Besides the District Court below there are just two such other courts, the California Court of Appeals for Division 5 of the Second District of California in *Pacific Tel. & Tel. Co.* v. *Redevelopment Agency of Glendale*, 87 Cal.

App. 3d 296, 151 Cal. Rpt. (1978) and the District Court for the Fourth District of Idaho in the unreported case of *Mountain States Tel. and Tel. Co.* v. *Boise Redevelopment Agency* (1980), from which the local judge's Memorandum Decision is reproduced in an appendix to the Petition for Certiorari (Appendix to Petition C-1).

The District Court below reasoned that Congress could not have intended to protect utility companies because they "retrieve their operating costs and the reasonable return of their investment from the general public in their franchise area through rates that are structured to accommodate costs and expenses" (A 57-8). The relevant competing interests here are not the interests of public service corporations against those of municipal corporations, but the interests of the Federal and local taxpayers for whose benefit Federal programs are designed against the interests of utility ratepayers who rarely if ever derive any special benefit from those programs. Furthermore the district court thus reached the conclusion that a utility company can never be a "displaced person" entitled to reimbursement of moving costs because they are recoverable from its customers—a conclusion which Petitioner admits is incorrect, conceding (Petitioner's Brief 24) that a telephone company moving its central office equipment for a redevelopment project is a "displaced person" entitled to reimbursement of its relocation costs notwithstanding the fact that such costs are equally recoverable from its customers if not reimbursed.

The District Court also overlooked the fact that the members of "the general public" from whom utility companies "retrieve their operating costs and the reasonable return of their investment" are usually (in this case 93% of C&P's customers) not within the franchise area of the city benefitted by the federally assisted project.

The California court in *Glendale* and the Idaho court which followed it in *Boise* reason from the insupportable premise that broad general provisions of an Act which undoubtedly changed the common law rule which everywhere requires owners and tenants of land acquired for public use to move their personal property and their business at their own expense should not be deemed to change similarly the common law rule which in many but not all states requires utility companies and their customers to bear the expense of moving utility lines built in streets. From this premise the California court reasoned that "an intent to exempt utilities from the common law *cannot be inferred from* the broad general definitions used in the relocations assistance law." (151 Cal. Rptr. at 70 Emphasis supplied). This reasoning ignores the fact that utility companies are included in the meaning of "displaced person" not be any mere inference but by the broad scope of the plain terms of the Act.

In addition to these decisions in *Glendale* and *Boise* Petitioner cites *Artesian Water Co.* v. *State Dep't. of Highways and Transportation*, 330 A 2d 432 (Del. Super. 1974) aff'd 330 A 2d 441 (Del. 1974), the unreported case of *Lone Star Gas Co.* v. *Landrieu*, No. 80-100C, (E.D. Okla. 1981), the judgment order in which is set out in the Joint Appendix (A319-332), and the unreported case of *National Fuel Gas Distribution Corp.* v. *Niagra Frontier Transp. Auth.* Civil no. 78-843 (W.D.N.Y. 1980) as being among the decisions of "those other courts which have construed the URA in circumstances similar to the case at bar" and held it to be inapplicable. (Petitioner's Brief 14-15) These cases did not involve or decide the question presented in the case at bar.

In *Artesian* there was no acquisition of real estate for the project and the water company could not and did not claim to be a displaced person" as defined in the URA. Its claim was based solely upon a Delaware statute, 17 Del. C. § 132 (b) (5), designed to take partial advantage of § 123 of the Federal-Aid Highway Act. This state law in terms authorized payment of the state's share of utility relocations costs only in cases where the Federal contribution paid 90% of the project cost, which was not true in this case. *Artesian* unsuccessfully argued that the subsequent enactment of a Delaware URA essentially like the Federal Act indicated a legislative policy to reimburse the full relocation cost in all cases, and should be given the effect of amending 17 Del. C. § 132 (b) (5) by repealing this limitation. *Artesian* in no way involved or even touched upon the claim of any "person who * * * moves * * * or moves his personal property from real estate as a result of the acquisition of such real property" for a Federally assisted project, or who moved as a result of a project receiving assistance under Title I of the Housing Act of 1949.

The decision in *Lone Star* likewise involved no acquisition of real estate for the project and the District Court based its decision squarely on this fact:

> **Fifth Street was being widened and paved. The street was already owned by the City. No land or easement was acquired by the City for their improvement. * * * (A322)**

Petitioner cites *National Fuel Gas* without anywhere indicating what were the facts or the nature of the District Court's decision in that case. We are informed by counsel for New York Telephone Company in this case that the utility companies utlimately prevailed in this litigation.

VI. CONDITIONS AND LIMITATIONS OF MUNICIPAL FRANCHISE AGREEMENTS HAVE NO BEARING HERE

Franchise ordinances and agreements merely implement a delegated governmental power to regulate the use of land dedicated to public uses. They are not the primary source of either the right to use streets for delivery of utility service or the obligation to move when required in the public interest.

The primary source of the right to use the land in a public street to deliver utility service is the dedication of the land for street use, which in urban areas must include delivery of utility service if the public is to be served by utilities.

> The character of the business of such companies was well known. Access with their lines to the houses of their customers in the city absolutely required the right to use the public streets, either longitudinally or to cross them. By such an exertion of its power to control and regulate the use of the streets it did not authorize a new public use. Such a use was a legitimate street use and did not impose upon the owner of the fee in the street an additional burden. * * * *Owensboro* v. *Cumberland Tel. & Tel. Co.*, 230 U.S. 58, 68 (1915).

Municipalities do not own the city streets.

> It is well settled that public highways, whether they be in the country or in a city, belong not partially, but entirely, to the public at large, and that the supreme control over them is in the Legislature. * * * (*Richmond* v. *Smith*, 101 Va. 161, 166, 43 S.E. 345 (1903)).

A city has neither any proprietary interest in the streets within its corporate limits nor any authority over them

except that which is expressly conferred on the city through a delegation of the State's police power to regulate and control the use of land dedicated to public use.

> The original source of power over both streets and highways is the State. But this power of control is generally delegated in some form to the municipalities and county authorities of the State. Thus the county fiscal courts, by §4306, Kentucky Statutes, are given 'general charge and supervision of the public roads,' etc. * * * (*Owensboro* v. *Cumberland Tel. & Tel. Co., supra,* 230 U.S. at 66).
>
> It is fundamental that streets and highways belong to the public. Subject only to the limitation that constitutional rights must not be invaded, supreme control over the streets and highways is vested in the state, which, acting under its police power and through the legislature, may prescribe reasonable restrictions and regulations for their use. *Norfolk & Portsmouth Tract. Co.* v. *Norfolk,* 115 Va. 169, 177, 78 S.E. 545, 547; *Ferguson* v. *Board of Supervisors,* 133 Va. 561, 566, 113 S.E. 860, 861.
>
> This power of the state over streets and highways may lawfully be delegated to local governing bodies, and when so delegated, may be exercised by such bodies to the full extent of the power conferred. *City of Lynchburg* v. *Peters,* 145 Va. 1, 9, 10, 133 S.E. 674, 677. (*Funeral Directors' Ass'n.* v. *Groth,* 202 Va. 792, S.E.2d (1961)).

Thus a municipal franchise ordinance which attempts to bind the municipality to make street repairs of a kind which are required of the street railway company by an Act of the state legislature granting its corporate charter is beyond the power of the city government and invalid. *Norfolk & P. Co.* v. *Norfolk,* 115 Va. 169, 78 S.E. 545 (1913). In so holding the court said:

In *City of Reading* v. *United Traction Company*, 215 Pa. St. 250, 380, 64 Atl. 446, 7 Ann. Cas. 380 (see also notes to the principal case), it was held that a street railway company, in the absence of express contract or statutory direction, is bound to keep the portions of the streets occupied by its right of way in proper repair. The court also observes: 'That the streets of a city belong to the State for the use of the people at large. To the municipality, as its agent, it commits the duty of at all times keeping them in proper repair for the convenience and safety of the public. This duty of the municipality does not shift, except when it is expressly or impliedly imposed upon another.' *City of Richmond* v. *Smith*, 101 Va. 161, 43 S.E. 345; *Bellenot* v. *City of Richmond*, 108 Va. 314, 61 S.E. 785; *White Oak Coal Co.* v. *City of Manchester*, 109 Va. 749, 64 S.E. 944, 132 Am. St. Rep. 943.

These principles are grounded upon the general proposition that the legislature, subject only to constitutional limitation, has supreme control over streets and highways; while, on the other hand, the power of a municipality is wholly dependent upon and measured by delegation from the government, and is held and exercised in subordination to its will. The one exerts sovereign power, the other granted power, and holds its streets as trustee for the general public. (115 Va. at 177).

And since the authority over streets delegated to municipalities is a purely governmental power and not a proprietary right a city cannot validly contract with a redevelopment and housing authority to close streets to be selected by the authority for inclusion in the land acquired by it. *Mumpower* v. *Housing Authority*, 176 Va. 426, 115 F.2d 732 (1940).

Nor can a city authorize the fencing in of part of a street for use as a fairground. *Chambers* v. *Roanoke I. Ass'n,* 111 Va. 254, 685 E. 980 (1910).

City governments can and do grant or withhold permission for a particular utility company to use the streets, prescribe or control the manner and location in which its facilities may be installed in the streets and impose other conditions for protection of the public, but in doing so they only exercise a regulatory power delegated by the state. Such power does not include authority to interdict the enactment of state or federal legislation requiring reimbursement for the cost of such relocations. Limitations on the privilege granted by municipal franchise agreements have no bearing on the question here presented.

A. Legislation Requiring Reimbursement of Relocation Costs Could Not Unconstitutionally Impair Any Contractual Obligation of C&P to Relocate at its Own Expense Since C&P's Franchise Imposed No Such Obligation

The ordinance granting C&P's franchise (A228-243) nowhere mentions removal or relocation of the company's facilities except to accommodate construction of city sewer and water lines (A236-7).

Petitioner and HUD rely on the fact that "the City has reserved the right to amend, alter or repeal the ordinance at its pleasure without providing compensation for any damage which might result (A240-241)" (Petitioner's Brief pg. 9; HUD's Br. 23).

It is well-settled that such provisions have no effect upon any of the contractual rights and obligations created by a franchise ordinance. As said in *Owensboro* v. *Cumberland Tel. & Tel. Co., supra.*

The sixth section of the granting ordinance provides that, 'This ordinance may be altered or amended as the necessities of the city may demand.' This is no more than a reservation of the police control of the streets and of the mode and manner of placing and maintaining the poles and wires incident to the unabridgeable police power of the city. *See Grand Trunk Railway* v. *South Bend,* 227 U.S. 544. It does not reserve any right to revoke or repeal the ordinance, or to affect the rights therein granted. Nor does the city attempt to justify its action in requiring the poles and wires to be removed from the streets under that section, but solely upon the general power in the city charter 'to make, publish and repeal ordinances.' This general power to repeal ordinances obviously refers to ordinances which are legislative in character, and exertions of the governmental power of the municipal council,—a power in its nature not to be abridged by irrepealable ordinances. *Baltimore* v. *Baltimore Trust Co.,* 166 U.S. 673; *Grand Trunk Railway* v. *South Bend, supra. The power to repeal, alter and amend such ordinances is one which inheres in the power to legislate, and its mention is pure supplusage.* (230 U.S. at 72-73 Emphasis supplied).

VII. IF THE COST OF RELOCATING UTILITY LINES BUILT IN STREETS IS NOT REIMBURSABLE UNDER §4622 (A) SUCH FACILITIES MUST BE ACQUIRED WITH THE LAND UNDER §4652 WITH ANOMOLOUS CONSEQUENCES

. 42 U.S.C. §4652, in Subchapter II of the Act establishing real property acquisition policies, appears to be directed primarily to the typical "ground lease" situation, such as the familiar case in which an industrial owner assembles vacant land for long-term control over its ultimate development and to insure its ultimate availability, and in the meanwhile permits it to be improved and developed by a tenant

who must remove or surrender his improvements upon the expiration or other termination of the lease. Nevertheless both its terms and its plain purpose include every case in which a person other than the landowner, who is a tenant in the broad sense of one who wholly or partially occupies the land, has been permitted to install buildings, structures or improvements without a right to keep them there indefinitely. The plain terms of §4652 require that any acquisition of such land for a government project, or of any interest or estate in that land, must be accompanied by an acquisition of such buildings, structures or improvements, so that the owner of them will not be forced to contribute to the project the use of these improvements which he would have enjoyed had the program or project not been undertaken.

This section carefully provides against any overlap or duplication of the payments required to be made under its provisions and any other compensation to which the owner of the improvements may be entitled under the law of eminent domain, under the relocation benefit provisions of the URA or under any other law, but just as clearly requires that if any such structures or improvements must be removed or "will be adversely affected by the use to which such real property will be put" by the acquiring agency, the improvements must be purchased or condemned with the real estate.

If the provisions of § 4622 (a) should be held inapplicable to relocations of utility lines built in streets, either under Petitioner's contention that C & P's facilities are real property for all purposes or on any other ground, it would follow that the land in the former street beds could not be acquired for redevelopment without acquiring the utility company's structures and improvements installed on that

land. This would present difficult and perplexing questions as to the proper application in such cases of the measure of compensation prescribed by § 4652, and would result in a much less appropriate method of correcting the inequitable effect of the project on utility ratepayers than the relief afforded by of §§ 4622 (a) and 4601 (6) and (7).

VIII. THE POSITION OF THE OPPOSING AMICI IS INEQUITABLE

Local governments are understandably reluctant to lose the advantage of being able to impose part of the cost of local improvements on nonresident utility ratepayers to whom they are not accountable, and the luxury of ignoring the unnecessary cost of redevelopment plans which require extensive utility relocations not essential to a proper redevelopment of the area. Unnecessary relocations are especially encouraged by HUD's indefensible policy exempting from this burden those who pay their utility bills at city hall instead of to a utility company, thus removing all incentive to avoid unnecessary relocations of utility facilities of all kinds.

Utility companies often serve a larger segment of the public than the communities benefitted by the project, as exemplified by the fact that 93% of C&P's customers are not in Norfolk (Stipulation A 37). The national government, having sponsored and financed programs which impose an unjust burden on people adversely affected in an infinite number of ways, including utility ratepayers, could not properly leave to state and local governments sole responsibility for correcting such inequities. Through the URA Congress has accepted this responsibility by establishing "a uniform policy for the fair and equitable treatment"

of all people who could otherwise bear part of the cost of dislocations caused by acquisitions of real estate for government projects.

The position of the opposing *amici curie* is supported by nothing more than the political expediency of financing part of a desired improvement through hidden taxes never recognized by those who pay them.

A. There Can Be No "Retroactive" Effect Unjustly Imposing Unbudgeted Expense On Local Agencies and No "Windfall" Or "Double Recovery" By Utility Companies

Local Governments cannot be left with the cost of such relocations. Contracts for capital grants made under 42 U.S.C. § 1453 have committed the United States to payment of the designated Federal share of net project costs, and under § 4631 (c) every such contract entered into before the effective date of the URA must be amended to include the cost of providing the relocation benefits prescribed by it. The required Federal contribution to any recovery on claims like those of C&P is no less enforceable than any other obligation of the national government.

The argument of some of the *amici* that there might be an indefinite accumulation of previously unasserted claims of this kind ignores the fact that no such claims must be paid unless filed "within eighteen months after the move is completed" (24 CFR § 42.221).

Nor could there possibly be any "windfall" or second recovery of utility relocation costs after they have been recovered from the utility company's customers. In its Brief on the Merits Petitioner apparently abandons the contention stressed in its Petition for Certiorari that payment of C&P's claims would compensate the company a second time for

costs already recovered from its customers, (Pet. for Cert. 25-6, 27-8), but some of the *amici* supporting Petitioner still so insist.

This contention, made for the first time in the Supreme Court and unsupported by any evidence whatever, could not possibly have been so supported.

Under the accounting principles applicable to C&P and most telephone companies relocation costs charged to a third party, such as the costs here charged to NRHA, are accounted for as accounts receivable. The Company's rate base and expenses for ratemaking purposes and its resulting rates are not increased. Only if it should be determined that these amounts heretofore charged to NRHA are not valid and collectible accounts receivable can they be treated as costs recoverable in the ratemaking process so that C&P's customers throughout the state will thereafter pay this part of the cost of Norfolk's urban renewal program.

CONCLUSION

The decision of the court of Appeals below was plainly right and should be affirmed.

Respectfully submitted,

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No. 81-2332

In the Supreme Court of the United States

OCTOBER TERM, 1982

NORFOLK REDEVELOPMENT AND HOUSING AUTHORITY, ETC., PETITIONER

v.

CHESAPEAKE AND POTOMAC TELEPHONE COMPANY OF VIRGINIA, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT URGING REVERSAL

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I

QUESTION PRESENTED

Whether the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, 42 U.S.C. 4601 *et seq.*, entitles a telephone company to compensation for the cost of constructing substitute service lines when public streets are relocated in order to accommodate a municipal urban renewal project funded in part by federal grants.

PARTIES TO THE PROCEEDING

In addition to the parties named in the caption, the Secretary of Housing and Urban Development, a defendant and appellee below, is a respondent pursuant to Rule 19.6 of this Court's Rules.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statute involved	2
Statement	2
Summary of argument	16
Argument:	
The Uniform Relocation Act does not grant compensation to a utility that, in order to accommodate a federally assisted state or local project, reconstructs in a new street location lines previously located, pursuant to a municipal franchise, within public streets	21
A. Introduction	21
B. Relocation benefits are generally available only to persons displaced by an acquisition of real property	24
C. Respondent's reconstruction of its lines does not constitute moving of personal property that is compensable under the Act	30
D. The reconstruction costs sought by respondent are outside the scope of relocation assistance available under Section 202(a)(1)-(3) of the URA	40
E. Congress' failure in the URA to repeal 23 U.S.C. 123 and the subsequent enactment of the District of Columbia Public Utilities Reimbursement Act of 1972 indicate that Congress did not intend to require payment of relocation expenses to utilities under the URA	43
Conclusion	47
Appendix	1a

TABLE OF AUTHORITIES

Cases: Page

Alexander v. *United States Department of Housing & Urban Development*, 441 U.S. 39 ..... 2, 4, 25, 35
Artesian Water Co. v. *State Department of Highways & Transportation*, 330 A.2d 432, aff'd as modified, 330 A.2d 441 ..... 11, 12, 27
Bell Telephone Co. v. *Pennsylvania Public Utility Commission*, 139 Pa. Super. 529, 12 A.2d 479 22
Berman v. *Parker*, 348 U.S. 26 27
Board of Supervisors v. *Virginia Electric & Power Co.*, 213 Va. 407, 192 S.E. 2d 768 8
Central Maine Power Co. v. *Waterville Urban Renewal Authority*, 281 A.2d 233 21
Chapman v. *Houston Welfare Rights Organization*, 441 U.S. 600 33
Consolidated Edison Co. v. *Lindsay*, 24 N.Y. 2d 309, 248 N.E. 2d 150, 300 N.Y.S. 2d 321 21-22
Consumers Power Co. v. *Costle*, 615 F.2d 1147 ..... 12, 26, 27
Department of Transportation & Development v. *Beaird-Poulan, Inc.*, 449 U.S. 971 42
Detroit Edison Co. v. *City of Detroit*, 332 Mich. 348, 51 N.W. 2d 245 22
Heller v. *Woodley*, 202 Va. 994, 121 S.E. 2d 527 8
Lone Star Gas Co. v. *Landrieu*, No. 80-100-C (E.D. Okla. Mar. 30, 1981) 12, 26-27
Mountain States Telephone & Telegraph Co. v. *Boise Redevelopment Agency*, No. 52891 (Idaho 4th Judicial D. Oct. 27, 1980), appeal pending, No. 13997 (Idaho Sup. Ct.) 27
New Orleans Gas Co. v. *Drainage Commission*, 197 U.S. 453 ..... 16, 22
Pacific Telephone & Telegraph Co. v. *Redevelopment Agency*, 87 Cal. App. 3d 296, 151 Cal. Rptr. 68 ..... 12, 27
Pennhurst State School & Hospital v. *Halderman*, 451 U.S. 1 40
Port of New York Authority v. *Hackensack Water Co.*, 41 N.J. 90, 195 A.2d 1 22
Potomac Electric Co. v. *Fugate*, 211 Va. 745, 180 S.E. 2d 657 23

Cases—Continued: Page

Public Service Co. v. *Harris*, No. 79-C-37-BT (N.D. Okla. Aug. 22, 1980) 12, 27
Robert C. Herd & Co. v. *Krawill Machinery Corp.*, 359 U.S. 297 38
State v. *Idaho Power Co.*, 81 Idaho 487, 346 P.2d 596 22
Transcontinental Gas Pipe Line Corp. v. *Prince William County*, 210 Va. 550, 172 S.E. 2d 757 33
Triangle Improvement Council v. *Ritchie*, 402 U.S. 497 43-44
United States v. *564.54 Acres of Land*, 441 U.S. 506 ..... 42, 46
United States v. *Turkette*, 452 U.S. 576 24

Constitution, statutes, and regulations:

U.S. Const.:
Amend. V 16, 22, 26, 34
Just Compensation Clause 16
Amend. XIV 16, 22, 26
Due Process Clause 16
Demonstration Cities and Metropolitan Development Act of 1966, Title I, 42 U.S.C. 3301 *et seq.* 3
District of Columbia Public Utilities Reimbursement Act of 1972, Pub. L. No. 92-495, 86 Stat. 812: 32, 45
Section 2, 86 Stat. 812 46-47
Section 4, 86 Stat. 813 46-47
Federal-Aid Highway Act of 1958:
23 U.S.C. 123 ..... 19, 20, 32, 44, 45
23 U.S.C. 123(c) 46
Highway Relocation Assistance Act, 23 U.S.C. (1970 ed.) 501 *et seq.* 19, 20, 43, 44, 45
Housing Act of 1949, Title I, 42 U.S.C. (& Supp. IV) 1450 *et seq.* 3, 7, 10
Housing and Community Development Act of 1974, Section 116(a), 42 U.S.C. 5316(a) 3

Constitution, statutes, and regulations—Continued Page

Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, 42 U.S.C. 4601 *et seq.* 2
Section 101(2), 42 U.S.C. 4601(2) 46
Section 101(4), 42 U.S.C. 4601(4) 46
Section 101(5), 42 U.S.C. 4601(5) 2, 13
Section 101(6), 42 U.S.C. 4601(6) 2, 14, 24, 25, 28, 31, 39
Section 101(7), 42 U.S.C. 4601(7) 13, 36
Section 101(7)(B), 42 U.S.C. 4601(7)(B)..... 36
Section 101(7)(D), 42 U.S.C. 4601(7)(D)..... 37
Sections 201-218 (Title II), 42 U.S.C. 4621-4638 2
Section 201, 42 U.S.C. 4621 2
Section 202, 42 U.S.C. 4622 ..... 4, 10
Section 202(a), 42 U.S.C. 4622(a)....3, 11, 24, 25, 27-28, 30, 38, 39, 40
Section 202(a)(1), 42 U.S.C. 4622(a)(1) 4, 42
Section 202(a)(1)-(3), 42 U.S.C. 4622(a)(1)-(3) 24, 40
Section 202(a)(2), 42 U.S.C. 4622(a)(2) 4, 42
Section 202(a)(3), 42 U.S.C. 4622(a)(3) 4
Section 202(b), 42 U.S.C. 4622(b) 4, 25, 38
Section 202(c), 42 U.S.C. 4622(c) 4
Section 203, 42 U.S.C. 4623 4
Sections 203-204, 42 U.S.C. 4623-4624 25
Section 204, 42 U.S.C. 4624 .....4, 38, 39, 43
Section 205, 42 U.S.C. 4625 4
Section 210, 42 U.S.C. 4630 ..... 4, 40
Section 213(b)(3), 42 U.S.C. 4633(b)(3) 5
Section 213(c), 42 U.S.C. 4633(c) 5
Section 217, 42 U.S.C. 4637 .....3, 10, 14, 17, 24, 27, 28-29, 31
Section 220, 84 Stat. 1903 43
Section 301(8), 42 U.S.C. 4651(8) 26

28 U.S.C. 1331(a) 12
28 U.S.C. 1346(a)(2) 41
28 U.S.C. 1361 12
Va. Code § 25-235 (repl. 1976) 5

Constitution, statutes, and regulations—Continued Page

Va. Code § 36-4 (repl. 1976) 7
24 C.F.R.:
Section 42.15(b) 5
Section 42.703(b) 5
Section 42.707(a) 10
Section 42.707(b)(4) 5
Section 42.711 5
40 C.F.R. 4.104 5

Miscellaneous:

115 Cong. Rec. (1969):
p. 31372 36
p. 31533 ..... 26, 34
p. 31534 ..... 26, 34
116 Cong. Rec. (1970):
p. 40167 34
p. 40170 34
12 E. McQuillin, *The Law of Municipal Corporations* (3d ed. 1970) 21
4A Nichols, *The Law of Eminent Domain* (J. Sackman rev. 3d ed. 1970) 21
H.R. Rep. No. 91-1656, 91st Cong., 2d Sess. (1970) 26, 29, 34, 35, 36, 45
H.R. Rep. No. 92-906, 92d Cong., 2d Sess. (1972) .. 26, 45
S. 1681, 89th Cong., 2d Sess. (1966) 29
§ 9 29
S. 1, 91st Cong., 1st Sess. (1969) 29
§ 105(5) 36
S. Rep. No. 1378, 89th Cong., 2d Sess. (1966) 29, 35
S. Rep. No. 90-1456, 90th Cong., 2d Sess. (1968) .. 35
S. Rep. No. 91-488, 91st Cong., 1st Sess. (1969) ..2, 34, 35, 36, 38, 43
S. Rep. No. 92-1254, 92d Cong., 2d Sess. (1972) 45
Uniform Relocation Assistance and Land Acquisition Policies Act of 1969: Hearings on S.1 Before the Subcomm. on Intergovernmental Relations of the Senate Comm. on Government Operations, 91st Cong., 1st Sess. (1969) 35

Miscellaneous—Continued Page

Uniform Relocation Assistance and Land Acquisition Policies—1970: Hearings on H.R. 14898, 14899, S.1 and related bills Before the House Comm. on Public Works, 91st Cong., 1st & 2d Sess. (1969-1970) 35

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OPINIONS BELOW

The opinion of the court of appeals (J.A. 63-78) is reported at 674 F.2d 298. The opinion of the district court (J.A. 48-61) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 25, 1982. The petition for a writ of certiorari was filed on June 22, 1982, and was granted on January 17, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

The Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, 42 U.S.C. 4601 *et seq.*, is set forth in relevant part in the Appendix, *infra*, 1a-4a.

STATEMENT

1. Congress enacted the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 ("URA"), 42 U.S.C. 4601 *et seq.*, to "provide for uniform and equitable treatment of persons displaced from their homes, businesses, or farms by Federal or federally assisted programs." S. Rep. No. 91-488, 91st Cong., 1st Sess. 1 (1969). Title II of the Act, 42 U.S.C. 4621-4638, established a program of relocation assistance to assure that persons displaced by federal or federally-funded projects do "not suffer disproportionate injuries as a result of programs designed for the benefit of the public as a whole." 42 U.S.C. 4621.

Under Section 101(6) of the URA a "displaced person" is generally one who "moves from real property, or moves his personal property from real property, as a result of the acquisition of such real property, in whole or in part * * * for a program or project undertaken by a Federal agency, or with Federal financial assistance." 42 U.S.C. 4601(6).[1] In addi-

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[1] Alternatively a person who moves in response to a written order to vacate issued by an agency that has acquired, or proposes to acquire, real property for purposes of a federal project or a federally-assisted project, where the order results directly from an actual or contemplated acquisition, is also deemed a displaced person. 42 U.S.C. 4601(6); see *Alexander* v. *United States Department of Housing & Urban Development*, 441 U.S. 39, 62-63 (1979).

Under Section 101(5) of the Act, 42 U.S.C. 4601(5), the term "person" as employed in the URA is not limited to

tion, under a special provision of the Act, Section 217, 42 U.S.C. 4637, any person who after the effective date of the statute "moves or discontinues his business, or moves other personal property, or moves from his dwelling * * * as a direct result of any project or program which receives Federal financial assistance under" either the Urban Renewal or Model Cities programs administered by the Department of Housing and Urban Development, "shall * * * be deemed to have been displaced as a result of the acquisition of real property." [2]

Section 202(a) of the URA, 42 U.S.C. 4622(a) provides:

> Whenever the acquisition of real property for a program or project undertaken by a Federal agency in any State will result in the displacement of any person * * * the head of such agency shall make a payment to any displaced person * * *.

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natural persons but includes any individual, partnership, corporation, or association.

[2] The Urban Renewal Program established under Title I of the Housing Act of 1949, 42 U.S.C. (& Supp. IV) 1450 *et seq.*, and the Model Cities Program established under Title I of the Demonstration Cities and Metropolitan Development Act of 1966, 42 U.S.C. 3301 *et seq.*, have been superseded by other legislation. Section 116(a) of Housing and Community Development Act of 1974, 42 U.S.C. 5316(a), provided that no new grants were to be made under the Urban Renewal or Model Cities programs after January 1, 1975, except where funds had previously been committed thereto. The Department of Housing and Urban Development advises us that only a small number of ongoing urban renewal projects still exist. This case, however, arises from such a project. See pages 7-8, *infra*.

Assistance available under the URA includes "actual reasonable expenses in moving [a displaced person], his family, business, farm operation or other personal property" and "actual direct losses of tangible personal property as a result of moving or discontinuing a business * * * operation." 42 U.S.C. 4622(a)(1) and (2).[3]

State agencies acquiring real property with federal financial assistance are also effectively required to comply with the relocation assistance provisions of the URA. Section 210 of the Act, 42 U.S.C. 4630, prohibits the head of any federal agency from awarding

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[3] Assistance under the latter provision may in no event exceed the expense that would have been incurred in relocation. 42 U.S.C. 4622(a)(2). Under Section 4622(a)(3) the costs of locating a replacement business location are also recoverable.

In lieu of reimbursement for actual moving expenses incurred by displaced persons, 42 U.S.C. 4622(b) authorizes payment of fixed moving and dislocation allowances to persons dislocated from a dwelling. In certain circumstances similar payments computed by a formula based upon annual net earnings are available in lieu of actual moving costs to displaced businesses that cannot feasibly be relocated. 42 U.S.C. 4622(c).

In addition to the *relocation assistance* allowances required by Section 202 of the URA, Sections 203 and 204 of the Act, 42 U.S.C. 4623 and 4624, provide for payment of certain *costs of comparable replacement housing* for homeowners and tenants displaced from their dwellings by federal or federally assisted acquisitions, provided that occupancy requirements are met. Section 205 of the Act, 42 U.S.C. 4625, requires federal agencies to provide relocation advisory services to persons displaced by real property acquisitions for federal projects as well as to persons located immediately adjacent to the acquired property determined to have suffered substantial economic injury because of the acquisition. See *Alexander* v. *United States Department of Housing & Urban Development*, *supra*, 441 U.S. at 42 n.1.

federal grant funds to any state agency for a project that will result in displacement of any person unless he first receives "satisfactory assurances" from the grantee that "fair and reasonable relocation payments and assistance shall be provided to or for displaced persons" such as are required to be made by federal agencies under the Act.[4] Federal agencies are directed to promulgate regulations affording any person aggrieved by denial of relocation benefits in connection with such a project the right to have his application for benefits reviewed by the head of the state agency. 42 U.S.C. 4633(b)(3).[5] There is no statutory requirement that a right of administrative appeal to the federal grantor be provided, but some federal agencies have promulgated regulations to that effect under the residual rulemaking authority vested in them by the Act. See 42 U.S.C. 4633(c); compare 24 C.F.R. 42.703(b) and 42.707 (HUD regulations providing for appeal to HUD from grantee's denial of relocation benefits)[6] with 40 C.F.R. 4.104 (EPA regulations making no provision for appeal to EPA from displacing agency's denial of relocation benefits).

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[4] Many states, including Virginia, see Va. Code § 25-235 *et seq.* (repl. 1976) have adopted legislation modeled on the URA in order to comply with the obligations imposed on recipients of federal grants.

[5] In the case of direct federal projects the right of review required by the Act lies to the head of the federal agency. 42 U.S.C. 4633(b)(3).

[6] Under HUD regulations the grantee agency is required to make any relocation assistance payment determined to be due by the federal agency upon review of the state agency's action. 24 C.F.R. 42.15(b). The regulations also make clear the availability of judicial review of HUD action adverse to a person claiming relocation benefits. 24 C.F.R. 42.707(b)(4) and 42.711.

2. In 1898, the City of Norfolk, Virginia, enacted an ordinance granting respondent's predecessor,[7] the Southern Bell Telephone Company, permission (J.A. 228-229).

> to erect, operate and maintain its lines, including the necessary poles, wires and fixtures, upon, along and over sub-ways, with the necessary manholes and other appurtenances, under the surface of such public ways for the purpose of transmitting communication by electricity, the use of such public ways to be under such regulation affecting the general supervision and maintenance of such public ways as may be prescribed by law and the ordinances of [the City of Norfolk] * * *.

In return for permitting Southern Bell to install and maintain its lines on public ways, the City stipulated that it was to receive free service for its fire alarm wires (J.A. 230-231), free use of ten telephones (J.A. 231), and an annual fee of three percent of Southern Bell's gross earnings from local telephone service (*ibid.*).

Yet another condition of the franchise was that Southern Bell "shall, upon notification by the City Engineer that he intends to lay sewer or water pipes, at once proceed to change the location of any subways constructed by it that may interfere with the progress of the work, or else protect the same at its own expense and without cost to the city" (J.A. 236-237). The 1898 ordinance further provides that Southern Bell should "at all times be subject to the general ordinances of the city now in existence or which may be hereafter passed, relative to the manner of the use of public streets or other public places by telegraph

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[7] We employ the term respondent to denote the plaintiff, Chesapeake and Potomac Telephone Company of Virginia.

or telephone companies" (J.A. 241). Finally, the City reserved to itself the right to amend, alter or repeal its ordinance "at its pleasure and without making any compensation for any damage that may result from such amendment, alteration or repeal" (*ibid.*).

Pursuant to its franchise, respondent has from time to time installed underground conduit carrying telephone cables and constructed appurtenant manholes needed for service access throughout the street network of the City of Norfolk.

3. a. Petitioner Norfolk Redevelopment and Housing Authority is an autonomous political subdivision of the Commonwealth of Virginia, independent of, but located in, the City of Norfolk, created under Va. Code § 36-4 (repl. 1976). In the 1960's, petitioner embarked upon several urban renewal projects employing federal grant funds under Title I of the Housing Act of 1949 (see page 3 note 2, *supra*) designed to eliminate slums and urban blight in various parts of Norfolk. Petitioner's redevelopment plans entailed the acquisition of private property in the project area, demolition of irredeemably blighted buildings, rezoning and comprehensive planning for redevelopment, and disposition of the acquired land for various public and private uses, including renovation of reparable buildings and new construction, pursuant to the redevelopment plans.

Petitioner's urban renewal plans also required the reconfiguration of certain land parcels requiring realignment of street patterns. Petitioner arranged for the relocation of city streets where required by its plans by acquiring the land abutting the streets. Under Virginia law, this gave petitioner title to the land underlying the street itself, subject only to the city's overriding easement to use the street bed as a

public way. See *Board of Supervisors* v. *Virginia Electric & Power Co.*, 213 Va. 407, 412, 192 S.E.2d 768, 771 (1972); *Heller* v. *Woodley*, 202 Va. 994, 998, 121 S.E.2d 527, 531 (1961). Petitioner then requested that the City of Norfolk close the streets to be relocated. The City ultimately adopted ordinances closing the streets in question, discharging the servitude upon the property and freeing the land for other uses. In the course of its redevelopment activities, petitioner successfully sought the closing of streets in six different redevelopment locations. After a street had been closed, the City would open a new street constructed in the location specified by petitioner's redevelopment plan.

Among the locations in which respondent had installed lines under its franchise were the six streets that petitioner had, in conjunction with the City, relocated. Because of petitioner's acquisition of the land abutting these streets and Norfolk's subsequent closing of the streets, respondent's franchise no longer attached to these former rights-of-way. That franchise did, of course, attach, without further cost to respondent, to the new streets established under the redevelopment plan.[8] In order to provide service to its customers (including those to be located in the redeveloped area) respondent constructed new manholes and laid new conduit and cable in the newly created streets.[9] Respondent abandoned its existing conduits

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[8] In some cases it was necessary for respondent to install equipment in the new street locations prior to their formal dedication to the City as streets. In these instances petitioner granted respondent an interim right of entry for this purpose (J.A. 170-171, 215-218).

[9] The stipulation of facts entered by the parties recites (J.A. 45):

and manholes in the streets that were closed by the City (J.A. 100-101, 132-133).[10] The actual electrical cables that ran through the abandoned conduits were removed, occasionally to be stored for reuse, but more commonly to be sold for their scrap value (J.A. 132-134).

b. When construction of its new lines in the redevelopment area neared completion, respondent filed a claim with petitioner seeking to recover the cost of constructing new facilities in the amount of $686,422.53 (see J.A. 265).[11] Respondent generally sought to recover the cost of constructing replacement utility lines where it had constructed the new lines in the newly created streets as substitutes for lines located in the streets that had been closed. In at least one instance, however, respondent sought to recover the cost of constructing facilities in an altered location within an existing street bed (see J.A. 94).

Petitioner denied respondent's claim and adhered to its decision in the face of respondent's request for reconsideration. Then, because petitioner's urban re-

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> 13. After passage of the several street closing ordinances [respondent] was not permitted to retain [its] [f]acilities in the former street beds, except upon a temporary basis.

It is not clear whether or to what extent respondent could have met its service requirements, including those for the redeveloped area and the rest of its service area by retaining its lines in their former locations (see J.A. 89-90). Nor is it clear whether respondent sought easements from petitioner to permit it to do so (see J.A. 167-170).

[10] The tops were removed from the manholes, and the access space beneath was filled with dirt and covered over, while the conduits were abandoned in place (J.A. 100-101, 132-133).

[11] Petitioner had evidently assumed that respondent would bear this expense and had not included any item in its project budget for this expense (J.A. 269-270 nn. 3 & 4).

newal projects were federally assisted under Title I of the Housing Act of 1949, respondent petitioned the Department of Housing and Urban Development for review of petitioner's decision, pursuant to HUD regulations implementing the federal Uniform Relocation Assistance and Real Property Acquisition Policies Act (see J.A. 8-11). Pursuant to agency regulations, the request for review was directed to the area office of HUD. See 24 C.F.R. 42.707(a).

The HUD area manager upheld petitioner's rejection of respondent's claim (J.A. 263-291). Petitioner argued that, as a matter of fact and state law, the City, a legal entity distinct from itself, was responsible for the street closing that ousted respondent's franchise. The area manager was not persuaded that petitioner could avoid responsibility for payment of any relocation costs otherwise due on this basis (J.A. 271-273). In any event, because the street was closed as part of an urban renewal project, the area manager determined that the special rule of 42 U.S.C. 4637 applicable to such projects was controlling. The area manager accordingly determined that persons required to move as a result of the project should be deemed to have been displaced as the result of "the acquisition of real property" for purposes of determining the availability of relocation benefits under Section 202, 42 U.S.C. 4622.[12]

The area manager also rejected petitioner's contention that the lines relocated by respondent are real property rather than personal property and that the associated expense accordingly is not recoverable un-

[12] The area manager also noted that petitioner had acquired all of the land abutting the street, and that it was that acquisition that enabled petitioner to have the street closed, displacing respondent's franchise right (J.A. 274).

der Section 202(a) of the URA, 42 U.S.C. 4622(a). Applying the law of fixtures, and believing that all of the expense for which respondent sought compensation entailed equipment actually "removed from the public ways" (J.A. 278), the area manager concluded that the equipment involved had not become affixed to the land (J.A. 275-278).

The area manager nevertheless denied respondent's claim, finding no evidence that the URA was intended to alter the prevailing common law rule that a utility is not eligible for compensation when required to relocate its lines, removing from service equipment placed in street locations pursuant to a franchise granted by the local governing body, so as to accommodate public improvements, or exercise of the police power (J.A. 278-286).[13] The area manager's decision informed respondent of its right to secure judicial review of her action (J.A. 286).

4. On October 10, 1979, respondent commenced this action in the United States District Court for the Eastern District of Virginia. By its complaint (J.A. 1-14) naming the Secretary of Housing and Urban Development and petitioner as defendants, respondent alleged a violation of the URA, and sought relief under the Administrative Procedure Act, the Declara-

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[13] The area manager cited with approval the decision of the Delaware court in *Artesian Water Co.* v. *State Department of Highways & Transportation*, 330 A.2d 432 (1974). The area manager also pointed to legislative history indicating that the URA was intended to conform to existing HUD rules governing eligibility for relocation assistance, and observed that those rules had excluded the cost of utility line relocation from eligible project costs unless state or local law or the particular franchise agreement required the housing authority to pay them (J.A. 283-284).

tory Judgment Act, and 28 U.S.C. 1361.[14] Respondent sought declaratory, mandatory and monetary remedies: a declaration that it is entitled to compensation under the URA upon its claim; an order that the Secretary direct petitioner to pay that compensation, and a judgment, in the amount of $686,422.53, plus interest from the date of claim until payment, against each defendant (J.A. 12-13).

The district court ordered a bifurcated trial (J.A. 34-35). Evidence and a stipulation of undisputed facts (J.A. 37-47) pertaining to liability was received in the first phase. After the liability trial the district court entered judgment for the defendants (J.A. 48-61). The district court followed the decisions of other federal courts and decisions of state courts holding that a utility required to move its lines from a public street to accommodate public works is not entitled to relocation assistance under the URA (J.A. 52-55).[15] Because the common law rule requiring utilities to bear the cost of relocating their lines when necessitated by public activity was well established, the court concluded that the absence of any language in the URA or its legislative history reflecting a purpose to alter prevailing practices was a telling indication that no such change was intended (J.A. 55-57). Finally,

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[14] Jurisdiction was premised upon 28 U.S.C. 1331(a) and 28 U.S.C. 1361.

[15] As authority for its decision, the district court cited *Consumers Power Co.* v. *Costle*, 615 F.2d 1147 (6th Cir. 1980); *Lone Star Gas Co.* v. *Landrieu*, No. 80-100-C (E.D. Okla. Mar. 30, 1981); *Public Service Co.* v. *Harris*, No. 79-C-37-BT (N.D. Okla. Aug. 22, 1980); *Artesian Water Co.* v. *State Department of Highways & Transportation*, *supra*, and *Pacific Telephone & Telegraph Co.* v. *Redevelopment Agency*, 87 Cal. App. 3d 296, 151 Cal. Rptr. 68 (1978) (interpreting parallel provisions of state law).

the district court observed that the ability of publicly regulated monopoly utilities to include the cost of substitute facilities in their rate bases, and thus to assure recovery of the full cost of relocation from its customers, set such utilities apart from the businesses and individuals that Congress intended to protect in the URA (J.A. 57-60).

5. The court of appeals reversed (J.A. 63-78). The court deemed misplaced the reliance of the district court and the defendants upon the common law rule denying compensation to utilities that move their lines. The court stated (J.A. 68):

> The [URA] was intended to create rights that were not recognized at common law. A tenant at will, for example, can recover relocation expenses as a displaced person under the Act even though the common law recognized no such right. The plaintiff in this case is, in certain respects, similar to a tenant at will because it has a right to use the city's streets for its lines only at the will of the city.

Congress' failure explicitly to mention the situation of utilities was not significant in the court of appeals' view, for the legislative history was thought to reflect an intent "to extend benefits *uniformly* to persons who are displaced by federal acquisition of real property" (J.A. 70; emphasis added). The court concluded that (*ibid.*) "[e]xclusion of utilities from the Act's coverage would run counter to that purpose." Framing the issue in controversy as whether a utility comes within the URA's definition of a "*business*" (42 U.S.C. 4601(7)) and thus within the statutory definition of a "*person*" (42 U.S.C. 4601(5); see page 2 note 1, *supra*), the court of appeals answered the question affirmatively and readily concluded that

respondent is a *displaced person* within the meaning of 42 U.S.C. 4601(6) and accordingly is eligible for relocation benefits under the Act (J.A. 66-67, 70-71).

The court of appeals rejected two additional arguments raised by petitioner and the Secretary. First, the court concluded that respondent's relocation should be regarded as "a result of acquisition of * * * real property * * * for a program or project undertaken by a Federal Agency or with federal financial assistance" (42 U.S.C. 4601(6)), notwithstanding the fact that the direct cause of the move was the City's closing of the streets.[16] The court observed that petitioner's acquisition of the abutting property had been an essential element of the petitioner's plan to acquire title to the street beds, that the street closings were an integral part of the overall scheme, and that the City had acted in close cooperation with petitioner in closing the street (J.A. 71-73).[17]

Second, the court of appeals rejected defendants' contention that respondent's expenses were not com-

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[16] The court of appeals did not rely upon 42 U.S.C. 4637 for its conclusion. Compare page 10, *supra*.

[17] The court of appeals noted that some of the utility line relocations did not result from complete closure of a street (see page 9, *supra*), and directed that the district court determine upon remand whether the expenses incurred by respondent in such instances "resulted in whole or in part from the federal acquisition" (J.A. 73). (The court of appeals referred repeatedly to federal acquisition of real property. Strictly speaking, no agency of the United States acquired any real property interest in connection with petitioner's urban renewal projects. Rather, under the urban renewal program, petitioner, HUD's grantee, acquired the land in the urban renewal area abutting the streets that were closed.)

pensable because they did not relate to movement of personal property, but to a realty interest (J.A. 74-78). Treating the question as one governed by the state law of fixtures, the court concluded that the telephone lines were to be regarded as personalty, because respondent "could hardly have intended them to become so annexed to real estate belonging to others that the lines themselves became the real property of those other owners" (J.A. 75). The court observed that all of the parties had recognized respondent's "right" to remove its equipment from the closed streets, a right that is inconsistent with a characterization of the equipment as fixtures (J.A. 75-76). The court also explained that characterization of the lines as personal property is consistent with what it regarded as the purpose of the statutory limitation upon relocation benefits (contained in 42 U.S.C. 4622(a)(1)) to the expense of moving personal property: to bar payment of duplicate compensation to one who is already entitled to just compensation for a taking of his "nonremovable real estate" (J.A. 78). The court observed (*ibid.*):

> There is no possibility of double compensation here, for [respondent] did not sell any land, and it received no compensation through any sale or condemnation.

The case was remanded to the district court for further proceedings (*ibid.*).[18]

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[18] The court of appeals did not consider what remedy might be appropriate on remand.

SUMMARY OF ARGUMENT

A. Under the common law of the states it is well established that utilities that avail themselves of municipal franchises authorizing the location of lines within public streets are required to absorb the expense of relocating those lines whenever the public convenience or necessity so requires. It is equally well established that this rule does not offend the Fifth Amendment Just Compensation Clause or the Fourteenth Amendment Due Process Clause. See *New Orleans Gas Co.* v. *Drainage Commission*, 197 U.S. 453 (1905). The question presented in this case is whether the Uniform Relocation Assistance and Real Property Acquisition Policies Act overrides the common law doctrine and requires a municipal corporation that displaces utility lines from city streets in connection with a federally-assisted project to reimburse the utility for its expenses in constructing substitute lines in new street locations.

B. In order to be eligible for relocation assistance under the Uniform Act, a person is required to establish three threshold qualifications. *First*, he must show that the cause of his displacement is an acquisition of the real property that he formerly occupied. *Second*, he must show that he has moved his personal property from real property. *Finally*, he must show that the items for which reimbursement is sought are compensable under the Act.

Displacement of utility lines from street locations by federally funded state or local public works projects ordinarily does not create a basis for payment of relocation benefits under the Act, because displaced utilities typically cannot meet the first of the foregoing statutory requirements. That is, because the local government entity already owns the public street (or a right-of-way therein), displacement of a utility

line from its location in the public right-of-way does not result from an acquisition of the street bed. Moreover, ouster of a utility's line from a street location effects no taking and thus does not result from an acquisition of a protected property right belonging to the utility itself.

Nevertheless, because of the nature of urban renewal projects, which typically entail street closings in conjunction with acquisition of adjacent property, and the rule of Virginia law that gives the owner of adjoining property title to the street bed, an argument is available to respondent that its displacement *does* result from the acquisition of the real property it occupied. In addition, although there is contrary legislative history, it is arguable that, for purposes of urban renewal projects Section 217 of the URA eliminates the requirement that displacement be directly traceable to an acquisition of the real property occupied by the person displaced. Even if respondent can qualify as a person displaced by acquisition of real property, however, it is not entitled to relocation assistance because it can meet neither of the two remaining requirements for reimbursement under the URA.

C. 1. First, respondent has not actually moved personal property from real property. Instead it has merely abandoned the bulk of its equipment in place and sold the rest for salvage. Respondent thus has not moved the equipment formerly in service in the old locations to its substitute locations. Moreover, it appears that respondent's conduct is typical of utilities that relocate their lines. Significantly, when Congress has made provision for payment or reimbursement of relocation expenses incurred by utilities, it has adopted formulas that reflect the understanding

that utilities do not move their former lines in the fashion that businesses and natural persons move their personal property. Thus respondent simply has not relocated its property in the sense Congress had in mind in providing for relocation benefits.

2. Even if respondent had in a literal sense moved its equipment from the former locations of its lines to the new ones, no relocation assistance would be due it, for the legislative history of the URA strongly suggests that Congress did not intend to provide relocation benefits to utilities that relocate their lines to accommodate local public works projects. Congress' purpose in enacting the URA was instead to provide a supplemental measure of compensation for businesses and families displaced from the premises they occupied by an acquisition of real property. Relocation benefits were intended to complement the market value standard developed by the courts under the Just Compensation Clause by providing for actual moving costs, as well as providing for the cost of acquiring comparable substitute residential or business premises in excess of the market value of the premises taken. But nowhere in the extensive legislative history of the URA compiled by Congress over a ten-year period is there any suggestion that the bill would override the common law rule allocating the cost of utility relocation caused by public works projects to the utility franchise holder. Thus there is no reason to believe that Congress used the inartful terms "moves * * * personal property" to describe the reconstruction of utility lines.

3. In the absence of any indication of legislative intent to do so, Congress should not lightly be pre-

sumed to have overridden the common law rule in a manner that imposes substantial obligations upon state and local governments, as well as the United States. Merely because the URA creates some rights unknown at common law, it does not follow that state and local governments must bear the expense of utility relocation triggered by federally assisted projects. The court of appeals' reasoning overlooks the limiting language that defines the rights created by statute. Thus, for instance, it is immaterial that Congress contemplated payment of relocation assistance to residential tenants-at-will displaced by real property acquisition. In such cases displacement clearly entails moving of personal property.

D. Respondent also cannot satisfy the final statutory prerequisite for the availability of relocation assistance under the URA, for its claims do not represent actual reasonable expenses in *moving* a business or personal property. Instead respondent seeks to recover the very costs of *constructing* substitute facilities explicitly assigned to it by state law.

E. Congress' selective repeal of existing statutory provisions at the time it enacted the URA confirms that the URA does not require payment of the respondent's claims. In enacting the URA Congress repealed the special relocation assistance provisions of the former Highway Relocation Assistance Act (23 U.S.C. (1970 ed.) 501 *et seq.*) upon which it was modeled. However, Congress did not repeal 23 U.S.C. 123, which stipulates that federal funds may be used by states to pay utilities relocation expenses caused by highway construction if *and only if* state law requires reimbursement of such expenses. In view of Congress' sweeping and methodical repeal of

other provisions of law that were inconsistent with, or were absorbed by the URA, Congress' failure to repeal Section 123 is a strong indication that the URA does not override the common law rule requiring utilities to bear the expense of such relocation.

Similarly telling is the enactment by Congress, in 1972, of the District of Columbia Public Utilities Reimbursement Act, which requires the compensation of utilities for relocation expenses that result from urban renewal and highway projects in the District of Columbia only. This enactment would have been unnecessary if the URA had already required such compensation.

We note as well that under any measure or formula for determining the relocation costs of utilities it is necessary to take into account both the increased value of substitute facilities constructed and any salvage value of old equipment removed from service. The URA makes no provision for such computations. A striking contrast is provided by Section 123 of the Highway Act and the District of Columbia Public Utilities Reimbursement Act, each of which provide a formula for taking into account the special aspects of utility relocation in determining any benefit to be paid.

ARGUMENT

THE UNIFORM RELOCATION ACT DOES NOT GRANT COMPENSATION TO A UTILITY THAT, IN ORDER TO ACCOMMODATE A FEDERALLY ASSISTED STATE OR LOCAL PROJECT, RECONSTRUCTS IN A NEW STREET LOCATION LINES PREVIOUSLY LOCATED, PURSUANT TO A MUNICIPAL FRANCHISE, WITHIN PUBLIC STREETS

A. Introduction

For obvious reasons utilities such as respondent that transmit gas, electricity or telephonic communications through pipes or by wire from a centrally located distribution point to numerous customers typically find it convenient to install their distribution lines within the pre-existing networks that provide convenient access to those customers—the public street systems that exist in every municipality in the United States. States and their municipalities have traditionally allowed access for this purpose to utility corporations through the grant of franchises, permits or licenses similar in terms to that granted by the City of Norfolk to respondent's predecessor in 1898. Yet the rights acquired by utilities pursuant to such instruments have a special character. Pursuant to the common law of the states, whenever public convenience or necessity so requires, a utility occupying a public right-of-way is expected to relocate its lines at its own expense. 12 E. McQuillin, *The Law of Municipal Corporations* § 34.74a (3d ed. 1970); 4A Nichol's, *The Law of Eminent Domain* § 15.22 (J. Sackman rev. 3d ed. 1970).[19]

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[19] See, *e.g.*, *Central Maine Power Co.* v. *Waterville Urban Renewal Authority*, 281 A.2d 233 (Me. 1971); *Consolidated Edison Co.* v. *Lindsay*, 24 N.Y. 2d 309, 248 N.E. 2d 150, 300

This Court has recognized the prevailing common law rule, and has held that the denial of compensation to a utility required by a state or municipality to relocate its lines within the public streets does not effect an unconstitutional taking of property in violation of the Fourteenth and Fifth Amendments. In *New Orleans Gas Co.* v. *Drainage Commission*, 197 U.S. 453 (1905), the Court held that the New Orleans Drainage Commission was not required to compensate a natural gas distribution company for the expense of relocating its lines from their existing alignment, established pursuant to a municipal franchise, beneath city streets, when those lines were dislodged in order to accommodate construction of a drainage system. The Court stated (*id.* at 462):

> The gas company, by its grant from the city, acquired no exclusive right to the location of its pipes in the streets, as chosen by it, under a general grant of authority to use the streets. The city made no contract that the gas company should not be disturbed in the location chosen. In the exercise of the police power of the State, for a purpose highly necessary in the promotion of public health, it has become necessary to change the location of the pipes of the gas company so as to accommodate them to the new public work. In complying with this requirement at its own expense none of the property of the gas company has been taken, and the injury sustained is *damnum absque injuria*.

N.Y.S. 2d 321 (1969); *Port of New York Authority* v. *Hackensack Water Co.*, 41 N.J. 90, 195 A.2d 1 (1963); *State* v. *Idaho Power Co.*, 81 Idaho 487, 346 P.2d 596 (1959); *Detroit Edison Co.* v. *City of Detroit*, 332 Mich. 348, 51 N.W. 2d 245 (1952); *Bell Telephone Co.* v. *Pennsylvania Public Utility Commission*, 139 Pa. Super. 529, 12 A.2d 479 (1940).

The decisional law of Virginia embodies this rule. See *Potomac Electric Power Co.* v. *Fugate*, 211 Va. 745, 180 S.E. 2d 657 (1971). Moreover, the franchise under which respondent located its lines in the streets of Norfolk reflects the limitation upon the rights of the franchisee in several respects. First, the 1898 Norfolk ordinance grants the telephone company no vested right to maintain its lines in any particular location. Rather, the rights granted by their terms apply only within "public ways" (J.A. 229). And there is nothing in the franchise ordinance that suggests that the City has constrained its authority to close or alter the location of such streets. On the contrary, the ordinance affirms that the telephone company's rights are subject to "such * * * regulation affecting the general supervision and maintenance of such public ways as may be prescribed by law and the ordinances of" the City of Norfolk (*ibid.*) The terms of the franchise thus subject respondent to, *inter alia*, the City ordinances closing the streets to be rerouted in this case. The prevailing common-law rule is also reflected in the provision of the Norfolk ordinance (J.A. 236-237) requiring respondent to bear the expense of changing the location of its underground lines, when necessary to accommodate other public improvements—construction of water or sewer lines. Finally, the City reserved to itself in the ordinance (J.A. 241) the ultimate right to amend, alter or repeal the franchise granted without payment of compensation.

Under the prevailing common law rule, as recognized in Virginia, and embodied in the ordinance under which respondent's lines were installed, respondent plainly is not entitled to the compensation requested. Respondent does not quarrel with this

conclusion and the court of appeals acknowledged its force, describing as "settled" the "common law principle that utilities are not entitled to reimbursement for expenses incurred in moving lines when cities close streets" (J.A. 68). Although the court of appeals acknowledged (*ibid.*) that neither the language nor the legislative history of the URA makes any mention of payment of compensation to utilities, it concluded that the "literal language of the statute" (J.A. 70) had the effect of changing the common law rule in this respect (J.A. 68-71). For the reasons that follow, we submit that that conclusion is erroneous.

B. Relocation Benefits Are Generally Available Only to Persons Displaced by An Acquisition of Real Property

We start with the language of the statute. See *United States* v. *Turkette*, 452 U.S. 576, 580 (1981). In order to be eligible for relocation assistance under Section 202(a) of the URA, 42 U.S.C. 4622(a), a person is required to establish: *first*, that he has been displaced by an acquisition of the very real property he occupies for a federal program or federally-assisted state or local project (Section 101(6), 42 U.S.C. 4601(6), and Section 202(a), 42 U.S.C. 4622(a)); *second*, that he has "move[d] from real property, or move[d] his personal property from real property" (Section 101(6), 42 U.S.C. 4601(6); see also Section 217, 42 U.S.C. 4637); and *third*, that the compensation sought falls within the categories of expenses covered under Section 202(a)(1)-(3) of the Act, 42 U.S.C. 4622(a)(1)-(3).[20]

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[20] No question is presented in this case concerning any of the alternate or supplemental forms of relocation benefits

1. In the typical case of a utility that relocates its lines to accommodate a federally assisted local public works project such as road improvements or sewer line installation, relocation assistance cannot be had under the URA because the utility cannot meet the first of the three statutory requirements noted above. In Section 101(6) of the Act Congress stipulated that a displaced person is one who moves from real property "as a result of the acquisition of such real property." 42 U.S.C. 4601(6). Similarly, the operative provision of the Act, Section 202(a), limits the payment of relocation costs to circumstances where "the acquisition of real property for a program or project undertaken by a Federal agency * * * will result in the displacement of any person." 42 U.S.C. 4622(a). And in *Alexander* v. *U.S. Department of Housing & Urban Development*, *supra*, 441 U.S. at 50-51, the Court emphasized:

> [T]he language and origins of the Relocation Act demonstrate that Congress initially intended to provide better relocation assistance when property is acquired for federal programs, not to extend assistance beyond that limited context to all persons somehow displaced by governmental programs.
>
> Congress' basic objective remained unchanged * * *.

But under the settled doctrine described above (pages 21-24) the displacement of utility lines from a location within public streets where they have been placed pursuant to franchise so as to accommodate a public project ordinarily entails no acquisition or

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provided by the Act. See 42 U.S.C. 4622(a) and (b), 4623-4624 (see page 4 note 3, *supra*). Petitioner does not claim eligibility under any of those provisions.

taking of property, for the local government already owns the right-of-way within which the project is to be located, and the utility's francise right itself is not deemed a compensable interest. Moreover, both the language and legislative history of the URA make clear that the term "acquisition" employed in the statute is synonymous with a taking of real property by exercise of the power of eminent domain or by negotiated sale, for which payment of compensation is required either by state law or the Fifth and Fourteenth Amendments. Indeed, the terms "acquisition" and "taking" are used interchangeably in the legislative history,[21] and in the text of the Act itself.[22] Accordingly, as the courts have recognized, relocation of utility lines in order to accommodate a public project generally does not trigger the relocation assistance provisions of the URA. See *Consumers Power Co.* v. *Costle*, 615 F.2d 1147, 1148-1149 (6th Cir. 1980); *Lone Star Gas Co.* v. *Landrieu*, No. 80-100-C (E.D. Okla. Mar. 30,

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[21] See, *e.g.*, H.R. Rep. No. 91-1656, 91st Cong., 2d Sess. 1 (1970) (statute applies to persons who have "real property taken"); *id.* at 21-24 (discussing real property acquisition policies). See also 115 Cong. Rec. 31533 (1969) (remarks of Sen. Muskie referring to "condemning of land"); *id.* at 31534 (remarks of Sen. Mundt describing relocation assistance as "additional compensation" available "when property is taken").

[22] Section 301(8), 42 U.S.C. 4651(8) provides (emphasis added):

> If any interest in real property is to be *acquired* by exercise of the power of eminent domain, the head of the Federal agency concerned shall institute formal condemnation proceedings. No Federal agency head shall intentionally make it necessary for an owner to institute legal proceedings to prove the fact of the *taking* of his property.

1981),[23] *Public Service Co.* v. *Harris*, No. 79-C-37-BT (N.D. Okla. Aug. 22, 1980);[24] *Mountain States Telephone & Telegraph Co.* v. *Boise Redevelopment Agency*, No. 52891 (Idaho 4th Judicial D. Oct. 27, 1980), appeal pending, No. 13997 (Idaho Sup. Ct.);[25] *Artesian Water Co.* v. *State Department of Highways & Transportation*, 330 A.2d 432, 437-439 (Del. Super. Ct.), aff'd as modified, 330 A.2d 441 (Del. 1974); see also *Pacific Telephone & Telegraph Co.* v. *Redevelopment Agency*, 87 Cal. App. 3d 296, 151 Cal. Rptr. 68 (1978) (applying analogous provisions of state law).[26]

2. Several factors are present in this case, however, that may require a somewhat different analysis. First, because the project involved was an urban renewal project that entailed acquisition of the parcels abutting the streets to be located, see *Berman* v. *Parker*, 348 U.S. 26, 28-30 (1954), rather than a project to be constructed within the street itself, such as the sewer lines involved in *Consumers Power Co.*, *supra*, or the highway project involved in *Artesian Water Co.*, *supra*, it is arguable that, for purposes of the URA, the cause for the relocation of respondent's lines was "the acquisition of real property" for a federally assisted project, and thus that the threshold "acquisition" requirement of Section 202

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[23] This decision is reproduced in the Joint Appendix at 319-332.

[24] This decision is reproduced in the Joint Appendix at 303-318.

[25] This decision is reproduced at Pet. App. C-1 to C-23.

[26] Significantly, when Congress intended to make relocation assistance available in the absence of an acquisition of real property it did so explicitly, as in Section 217 of the URA, 42 U.S.C. 4637. See page 3, *supra*, and pages 28-30, *infra*.

(a) is satisfied here. Yet, this circumstance alone would not suffice to make respondent eligible for assistance as a displaced person because Section 101(6) specifies that a displaced party must have occupied the very real property that is acquired, 42 U.S.C. 4601(6), whereas here the property acquired adjoins the street bed itself.

On the other hand, we must recognize that, under Virginia law, petitioner's acquisition of parcels adjoining the streets to be closed gave petitioner title to the street beds themselves. See pages 7-8, *supra*. As a practical matter, that ancillary "acquisition" in turn made it possible for petitioner to persuade the City of Norfolk to close the streets, ousting respondent's franchise. It is accordingly at least arguable that displacement of respondent's lines from the streets wherein they were located "result[s] [from] the acquisition of *such* real property" within the meaning of Section 101(6) of the Act." It may still be answered, of course, that the operative cause of displacement is not the acquisition of the street bed in a case such as this. And indeed there is little to be said for a rule under which the result turns upon the fact that petitioner, a municipal corporation distinct from the City of Norfolk, is carrying out the federally assisted project, and thus in some technical sense "acquires" the real estate occupied by respondent's lines, whereas if the City, which already owned the public right-of-way, were itself the project sponsor, no acquisition would be recognized.

In addition to the factual circumstances and provisions of local law that set this case apart from the typical situation in which utility lines are displaced by local public works, account must be taken of the bearing of the special provisions of Section 217 of

the URA, 42 U.S.C. 4637. Under Section 217 one who moves as a "direct result" of an urban renewal project is "deemed to have been displaced as the result of the acquisition of real property." Displacement of respondent's lines in the streets closed in the urban renewal project areas may fairly be considered a direct result of the urban renewal project—even if not a direct result of a particular acquisition. Yet legislative history of Section 217 suggests that it was not intended to waive the acquisition requirement in the circumstances of this case.[27]

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[27] The House report accompanying S. 1, 91st Cong., 1st Sess. (1969), the bill that became the URA, states that Section 217 was included in the bill to conform to existing relocation programs operated by the Department of Housing and Urban Development. H.R. Rep. No. 91-1656, 91st Cong., 2d Sess. 20 (1970). But, as is indicated below (page 45 note 38), under HUD's regulations in effect when the URA was enacted, no relocation benefits were available to a utility in respondent's situation.

The House Report also recites (*ibid.*)

> This sec[t]ion provides that any person who moves as a result of a rehabilitation, demolition or concentrated code enforcement program under title I of the Housing Act of 1949, or a comprehensive city demonstration project under title I of the Demonstration Cities and Metropolitan Development Act of 1966, shall be considered to be displaced as a result of the acquisition of real property for such a program or project.

A more complete explanation of the purpose of Section 217 is provided in the legislative history of a predecessor to the URA, S. 1681, 89th Cong., 2d Sess. (1966), which was enacted by the Senate but did not receive final action in the House in 1966. Section 9 of S. 1681 was nearly identical to Section 217 of the 1970 Act. The Senate Report explained Section 9 of the bill as follows (S. Rep. No. 1378, 89th Cong., 2d Sess. 32-33 (1966)):

> This assures that relocation payments are available to those displaced as a result of code enforcement, demoli-

There is no occasion to sort out these complexities further here, however. Instead, we may simply assume for present purposes that respondent—unlike a typical utility with lines displaced by a public works project—can satisfy the first of the statutory requirements for eligibility for relocation benefits that we have described. For, as we explain below, respondent plainly can not satisfy the remaining requirements for compensation established by the URA.

C. Respondent's Reconstruction of Its Lines Does Not Constitute Moving of Personal Property that is Compensable Under the Act

1. As previously indicated, in order to establish eligibility for relocation assistance under Section 202(a) of the URA, respondent is required to demonstrate not only that the cause of displacement of its lines is an acquisition of the very real property it occupies, but also that it has "move[d] from real property, or move[d] [its] personal property from real

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tion activities, or voluntary rehabilitation activities carried out with assistance authorized by title I. Frequently, displacements occur even though the property is not acquired as a result of these projects. In addition, the provision would permit relocation payments to be made to anyone displaced from an urban renewal area in which a project receiving Federal financial assistance is being carried out. Such payments will be made regardless of whether the property from which the person is being displaced is acquired with federal financial assistance.

This legislative history confirms that in dispensing with the normal acquisition requirement for relocation assistance eligibility in urban renewal areas Congress' intention was merely to protect persons displaced by programs such as housing code enforcement and by acquisitions within an urban renewal area that are not carried out with federal funds rather than to benefit utilities, or others similarly situated.

property" (Section 101(6), 42 U.S.C. 4601(6)). Alternatively, assuming that respondent can satisfy the threshold acquisition requirement by recourse to the fiction embodied in Section 217, it must nevertheless establish that it has "move[d] or discontinue[d] [its] business, or move[d] other personal property, or move[d] from [a] dwelling." 42 U.S.C. 4637. Respondent cannot satisfy this additional requirement. Respondent does not suggest that it has moved or discontinued its business, moved itself (a term that appears to refer to the move of a business or of a natural person from a dwelling) or moved from a dwelling. Thus, whether analyzed under Section 101(6) or Section 217, the pertinent question is whether Congress intended to treat reconstruction of utility lines to accommodate public works as moving of personal property under the URA.

Contrary to the court of appeals' apparent assumption (J.A. 65), respondent did not remove its lines from their original locations in the realigned streets and reinstall this equipment in the new street locations.[28] Rather, respondent simply abandoned its conduits and manholes in place and constructed new lines as substitutes. While respondent did remove its cables from the conduits in which they had been installed, those cables were not transferred to the new street locations. See pages 8-9, *supra*. Accordingly, respondent simply has not moved personal property within the meaning of Section 101(6) or Section 217; it therefore cannot qualify for relocation benefits under the Act.

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[28] The HUD area manager's decision also appears to adopt this erroneous premise. See J.A. 278. HUD's decision in this case did not, however, turn on this point.

Nor is there any reason to believe that the facts of this case are unique in this respect. So far as we are aware, when utilities relocate lines in order to accommodate public improvements, it is commonplace simply to abandon equipment in place and construct new lines to replace the lines removed from service. This practice is reflected in those few statutes that Congress has enacted that do make provision for payment of relocation assistance to utilities in particular circumstances. See 23 U.S.C. 123; District of Columbia Public Utilities Reimbursement Act of 1972, Pub. L. No. 92-495, 86 Stat. 812. The formula for computing such assistance in each of these statutes contemplates reconstruction of the utility line, and abandonment or salvage of the old equipment. See pages 43-47, *infra*. And even where the old equipment is salvaged in part and incorporated into the substitute line, the net effect is scarcely one that can most aptly be described as "moving" of personalty or of a business.[29]

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[29] In determining whether respondent is eligible for assistance the court of appeals seemingly overlooked this statutory requirement and focused upon the separate (albeit closely related) question whether the property involved was realty or personal property (J.A. 74-78). The court of appeals thereby missed the dispositive point.

In any event, the court of appeals' conclusion that the property involved is personalty appears to be at least partly incorrect. The record of this case makes clear that respondent's conduits and manholes were permanently affixed to the streets in which they were installed. For instance, manholes —which consist of far more than meets the pedestrian's eye— are actually typically precast concrete structures with walls one foot thick, and inside dimensions twelve feet long, six feet wide, and seven feet deep, with the familiar access hole and metal cover at the top. These manholes are installed permanently in the ground (J.A. 116-119), just like the foundation of a building. Respondent's conduits were also

2. Even if respondent had physically moved its equipment from the old street locations to the new, the result would be no different. "As in all cases of statutory construction," in considering whether reconstruction of a utility line qualifies as moving of personal property for purposes of the URA, the Court's "task is to interpret the words of [the statute] in light of the purposes Congress sought to serve." *Chapman* v. *Houston Welfare Rights Organization*, 441 U.S. 600, 608 (1979). The legislative

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designed and intended to provide service indefinitely in their location; they were not removed when the lines were removed from service (J.A. 133, 140). Only respondent's cables—the actual electrical wires running through the pipelike conduits—were removed when respondent removed the lines in question from service (J.A. 133). In the circumstances, the bulk of respondent's equipment consisted of fixtures annexed to the land, and adapted for indefinite use in their existing location, but not suitable for removal and reuse in any other location. Accordingly, under Virginia law this equipment or at least the bulk of it was to be treated as real property. See *Transcontinental Gas Pipe Line Corp.* v. *Prince William County*, 210 Va. 550, 172 S.E. 2d 757 (1970). Contrary to the court of appeals' assumption (J.A. 75-77) respondent's retention of the legal right to remove its equipment is not inconsistent with classification of the property as a fixture annexed to the land. *Transcontinental Gas Pipe Line Corp.* v. *Prince William County, supra*, 210 Va. at 556, 172 S.E. 2d at 762. Unlike the court of appeals (J.A. 76-77), moreover, in characterizing respondent's equipment, we find it difficult to discount the real property characterization assigned to that equipment by respondent itself for purposes of state property taxation.

Assuming that some part of the respondent's equipment was properly regarded as personalty under state law, for the reasons stated in the text, it does not follow that, for purposes of the URA, the reconstruction of respondent's lines constitutes "*mov*[*ing of*] personal property." The latter question, of course, is a question of federal, rather than state law.

history of the URA detailing those purposes strongly suggests that, in authorizing compensation for persons who move from real property, Congress did not contemplate provision of compensation to utilities for reconstruction of lines located pursuant to municipal franchise within public streets.

Congress was prompted to enact the URA by its recognition that it had created a host of federal programs (and had provided federal support for state activities) that required the taking of privately held real property, without providing any assurance that such takings did not impose undue hardships on displaced persons. Congress was aware that the traditional rules governing just compensation for the taking of real property that had been developed by the courts under the Fifth Amendment limited compensation to the market value of property taken, without any element of compensation for the expense of relocating personal property, or a business. It was further recognized that "just compensation" included no allowance for the hardship created by the discrepancy that frequently exists between the market value of premises taken and the cost of acquiring substitute facilities. Congress thus perceived that the existing limits on compensation had the practical effect of placing homeowners, residential tenants, and businesses that were displaced by federal projects in a position inferior to that enjoyed prior to the taking. S. Rep. No. 91-488, 91st Cong., 1st Sess. 1-2, 6-8 (1969); H.R. Rep. No. 91-1656, 91st Cong., 2d Sess. 1-3 (1970); 115 Cong. Rec. 31533 (1969) (remarks of Sen. Muskie); *id.* at 31534 (remarks of Sen. Mundt); 116 Cong. Rec. 40167 (1970) (remarks of Rep. Edmondson); *id.* at 40170 (remarks of Rep. Cohelan).

The URA was enacted as the culmination of almost ten years of congressional consideration. See *Alexander* v. *U.S. Department of Housing & Urban Development*, *supra*, 441 U.S. at 49-53. The Senate enacted predecessor versions of the URA in the 89th Congress in 1966 and in the 90th Congress in 1968. See S. Rep. No. 91-488, *supra*, at 4-5. The text and legislative history of these bills is entirely silent respecting the issue of utility relocation. See, S. Rep. No. 90-1456, 90th Cong., 2d Sess. (1968); S. Rep. No. 1378, 89th Cong., 2d Sess. (1966).

Extensive hearings were held upon the proposed URA in both the House and Senate in the 91st Congress. See *Uniform Relocation Assistance and Land Acquisition Policies Act of 1969: Hearings on S. 1 Before the Subcomm. on Intergovernmental Relations of the Senate Comm. on Government Operations*, 91st Cong., 1st Sess. (1969); *Uniform Relocation Assistance and Land Acquisition Policies—1970: Hearings on H.R. 14898, 14899, S. 1 and related bills Before the House Comm. on Public Works*, 91st Cong., 1st & 2d Sess. (1969-1970). But at no point during these hearings was any suggestion made that the proposed bill would have any effect upon the common law rule that requires utilities to bear their own relocation costs. Indeed, although representatives of diverse interest groups were heard, the only representatives of an organization representing the interests of utilities to appear made no reference whatsoever to the relocation need of utilities. See *House Hearings*, *supra*, at 279-285 (testimony of Karl Baetzner, Vice President, American Right-of-Way Ass'n; statement of Harold Lewis, American Right-of-Way Ass'n). The Senate and House reports on the URA are equally silent as to any application of the legislation to displaced utility

facilities.[30] Instead, both make clear that Congress' concern was with homeowners and residential tenants forced from their homes, and with conventional business premises taken in order to accommodate federal or federally assisted projects. See S. Rep. No. 91-488, *supra*, at 1-2, 6-7, 9; H.R. Rep. No. 91-1656, *supra*, at 1-3; cf. 42 U.S.C. 4601(7) (definition of "business").[31] Thus there is no indication whatever that

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[30] ...nicus curiae Boston Redevelopment Authority observes (Br. 19-20) that, as reported by the Senate Committee, the relocation assistance bill included, within the definition of a displaced person, a proviso that

> [T]he term "displaced person" shall not include the owner of personal property on the premises of another under a lease or licensing arrangement where such owner is required pursuant to such lease or license to move such property at his own expense.

S. 1, 91st Cong., 1st Sess., § 105(5) (1969); 115 Cong. Rec. 31372 (1969). There is no indication in the legislative history that this ambiguous provision was intended to refer to public utility lines located in public streets pursuant to municipal franchises, and the language chosen does not seem apt for that purpose. Accordingly, the fact that the House version of the bill ultimately enacted includes no such language has no particular significance.

[31] Because respondent is engaged in the "sale of services to the public" (42 U.S.C. 4601(7)(B)) we do not question that it is a business that may qualify as a displaced person when it is required to move its personal property from realty by a federal acquisition of the real property. Compare pages 13-14, *supra*. Thus respondent as a utility is not disqualified from receiving the relocation assistance that the Act extends to commercial tenants whose offices are displaced. But the statutory definition of "business" reflects Congress' interest in insulating conventional commercial manufacturing, and service establishments from the costs of displacement, and that mere maintenance of property was not regarded as a protected interest.

Congress regarded the reconstruction of utility lines as moving of personal property from real property for purposes of the URA. By contrast, as we explain below (pages 43-46), when Congress intends to provide for payment of utility relocation costs, as it has done in several specialized settings, it has done so explicitly.

The court of appeals reasoned that in the absence of "any clear legislative intent to exclude utilities" from the coverage of the URA, it was obliged "to apply the literal language of the statute" so as to include utilities (J.A. 70). The absence of any affirmative expression of an intent to benefit utilities was deemed irrelevant (J.A. 68) because of the perceived mandate for uniformity in the availability of benefits (J.A. 70). The court of appeals overlooked, however, the eligibility requirements of the Act that define the "uniform" availability of benefits thereunder—including the requirement that a person demonstrate that he has moved his personal property. Because the statutory term "moves * * * personal property" would not commonly be understood to apply to the reconstruction of utility lines within the public streets, and because Congress' attention was focused exclusively on the problems of residential tenants and conventional business premises, the inference to be drawn from Congress' silence respecting the unique situation of utility franchise holders is that Congress did not alter the settled common law rule allocating the cost of utility line relocations to the franchise holder.

Significantly, in an analogous context when Congress meant to allow compensation for the movement of semi-permanent structures, it made that intention explicit. See 42 U.S.C. 4601(7)(D) (billboard relocation).

3. The existence of that settled common law rule is in itself reason to resolve any doubts respecting Congress' intentions against utilities such as respondent, see *Robert C. Herd & Co.* v. *Krawill Machinery Corp.*, 359 U.S. 297, 304-305 (1959), for the status of utility franchises at common law was both unique and well known. The court of appeals suggested that because the URA created rights unknown at common law, it should not be presumed that Congress preserved the common law rule allocating the cost of utility relocations caused by public projects to the utilities (J.A. 68-70). Here, again, the court of appeals overlooked the statutory language that defines and limits the rights that were created by the URA. For instance, the court of appeals observed that a residential tenant-at-will (who enjoyed no property right recognized at common law) can recover relocation expenses as a displaced person under the Act (J.A. 68-69). The court's observation is wide of the mark, however, for there can be no question that a tenant at will displaced from residential premises typically "moves" personal property from one location to another. Because there is no ambiguity in applying the statute to this situation, there is no occasion to interpret the statutory language against the backdrop of the settled common law doctrine.[32] But in the case of

[32] The court of appeals cited no statutory language, legislative history or other authority for its assertion that residential tenants at will are entitled to relocation assistance under the URA. We note that Section 204 of the URA, which creates a system of replacement housing cost payments for displaced residential tenants that is separate and apart from the relocation payments required by Section 202(a) and (b), specifies that payments are to be made to a displaced person who "actually and lawfully occupied" the premises from which he was displaced "for not less than ninety days prior to the

a utility that seeks compensation for reconstruction of its lines—an event that does not on its face resemble "moving" of personal property—it is perfectly appropriate to refer to the pre-existing law to ascertain congressional intent.

The legal status of residential tenants-at-will at common law is in yet another respect to be distinguished from that of a utility that locates its lines in public streets pursuant to a municipal franchise. Unlike the rules that govern the former—which grow out of the private landlord-tenant relationship—the noncompensability of relocation of utility lines is a doctrine developed specifically to govern the rights and obligations of utilities as against the public. Because local ordinances, state laws and contractual agreements expressly limit the liabilities of local government entities in this situation, it should not lightly be inferred that Congress intended to augment those liabilities. In short, while a residential tenant-at-will may have no property right at common law that entitles him to demand compensation, the acquiring authority has no vested right *not* to pay such compensa-

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initiation of negotiations for the acquisition of such dwelling." 42 U.S.C. 4624. This language does suggest that tenants-at-will may be eligible for benefits under Section 204. While the requirements of Section 204 do not control eligibility for relocation benefits under Section 202(a), the former provision may indicate that Congress intended to include tenants at will under Section 202(a) as well. Of course, there is no comparable indication in the statute that utilities that lack protected property rights in the location of their lines were to be granted relocation assistance. For this additional reason, assuming that the definition of a displaced person contained in Section 101(6) of the Act is broad enough to encompass residential tenants-at-will, a similar conclusion is not required as to utilities that reconstruct their lines.

tion. In the case of utility displacements, however, the common law provides the local government with the right to insist that the utility bear the cost of relocation of its lines. If Congress intended to alter that rule, it undoubtedly would have done so in language far clearer than that employed here. See *Pennhurst State School & Hospital* v. *Halderman*, 451 U.S. 1, 16-17 (1981).[33]

D. The Reconstruction Costs Sought by Respondent are Outside the Scope of Relocation Assistance Available Under Section 202(a)(1)-(3) of the URA

The final statutory requirement for the recovery of relocation assistance under Section 202(a) of the URA is that the claim must represent expenditures for items that are eligible under Section 202(a)(1)-(3). Under those provisions a displaced person is entitled to (42 U.S.C. 4622(a)(1)-(3)):

> (1) actual reasonable expenses in moving himself, his family, business, farm operation or other personal property;

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[33] As note above (pages 4-5), the URA is applied to states and local government entities that acquire real property pursuant to federally assisted programs through the condition that disbursement of grant funds await receipt of assurances from the grantee that it will comply with the requirements the Act imposes directly on federal agencies. See 42 U.S.C. 4630. Because neither the statutory text nor the legislative history reflects that utilities must be paid relocation compensation denied them by state law, Congress plainly has not "sp[oken] with [the] clear voice" that is necessary if the states are to be held to have knowingly shouldered the obligations that, in respondent's view, are imposed upon them by the Act. See *Pennhurst State School & Hospital* v. *Halderman*, *supra*, 451 U.S. at 17.

(2) actual direct losses of tangible personal property as a result of moving or discontinuing a business or farm operation, but not to exceed an amount equal to the reasonable expenses that would have been required to relocate such property, as determined by the head of the agency; and

(3) actual reasonable expenses in searching for a replacement business or farm.

Because the district court did not reach the question of damages, the court of appeals evidently assumed that it had no occasion to address the eligibility of the costs for which respondent seeks compensation.[34]

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[34] The district court's bifurcation of the trial into liability and damages phases (see J.A. 34-35), suggests that it had lost sight of the fact that the action was commenced pursuant to the Administrative Procedure Act to secure judicial review of the Secretary's action on respondent's appeal from petitioner's denial of its claim. The terms of the court of appeals' remand (see page 14 n.17, *supra*) suggest that it, too, had lost sight of the nature of respondent's cause of action. Under the Administrative Procedure Act, the proper course upon determining that respondent had some right to relocation assistance would have been to remand the case to the agency for determination of the claim. The agency, might in turn deem it proper to return the matter to petitioner, for its determination, in the first instance, of the amount of assistance due.

It is true that, in addition to declaratory relief and an order directing HUD to compel petitioner to pay its claim, respondent also sought a money judgment against both the federal defendant and petitioner (see J.A. 13) in the amount of the relocation benefits claimed, plus interest. But respondent has identified neither any waiver of sovereign immunity applicable to its money claim against the United States, nor any jurisdictional basis for presenting such a claim in the district court. Compare 28 U.S.C. 1346(a)(2). As for respondent's money claim against petitioner, it is at least an open question

But because it appears as a matter of law that the costs for which reimbursement is sought by respondent are outside the scope of the Act, it is appropriate to address the issue briefly here.

Given the posture of this case, it is difficult to be certain what the $686,422.53 claim tendered by respondent encompasses. It appears, however, that this sum represents primarily the cost to respondent of constructing its substitute lines in the new street locations created pursuant to the urban renewal plan (see J.A. 7).[35] But, for the reasons already stated (pages 30-40), this expense simply cannot be equated with the expense of moving personal property or a business. See 42 U.S.C. 4622(a)(1).[36]

It is especially significant, we submit, that the measure of compensation that is sought—the cost of construction of substitute facilities—is precisely that denied by the common law rule that governs the relationships of municipalities and their franchisees. No argument is available that the items for which compensation is sought are somehow distinct from those for which compensation is denied under the rule of state law. By contrast, assuming that relocation as-

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whether the URA or any other federal statute authorizes entry of such a judgment; moreover, a valid jurisdictional basis may be lacking. See *Department of Transportation & Development* v. *Beaird-Poulan, Inc.*, 449 U.S. 971 (1980) (Rehnquist, J., dissenting from the denial of certiorari).

[35] As indicated previously, respondent abandoned most of its facilities in place and constructed new ones. We do not understand respondent to claim that the rather limited work done to remove cables from the conduits to be abandoned accounts for the entire sum requested.

[36] Nor can it be equated with the value of "direct losses of tangible personal property as a result of moving or discontinuing a business" (42 U.S.C. 4622(a)(2)). Cf. *United States* v. *564.54 Acres of Land*, 441 U.S. 506 (1979).

sistance is to be paid to a tenant-at-will who lacks a compensable real property right at common law (see page 38 note 32, *supra*), the benefits available are for actual moving expenses, coupled with a special rent subsidy under Section 204 of the Act. These items are distinct from the market value of a leasehold—the item for which no compensation is due to a tenant-at-will under common law.

Thus, the court of appeals erred in suggesting (J.A. 78; see page 15, *supra*) that its decision was consistent with the purpose of limiting relocation benefits to the expense of moving personal property. Statutory relocation benefits were intended to cover a particular type of costs not addressed by preexisting law. See page 34, *supra*. But the cost of utility relocation was not a matter overlooked by the common law. Instead, that expense was deliberately assigned to utilities. Congress did not alter that allocation.

E. Congress' Failure in the URA To Repeal 23 U.S.C. 123 and the Subsequent Enactment Of The District of Columbia Public Utilities Reimbursement Act of 1972 Indicate That Congress Did Not Intend To Require Payment Of Relocation Expenses To Utilities under the URA

1. When it enacted the URA, Congress simultaneously repealed the many scattered provisions of law providing for relocation assistance to individuals, businesses, and farmers dislocated by various federal projects and programs. Section 220 (84 Stat. 1903). Among the laws so repealed were the relocation assistance provisions of the Federal Aid Highway Act of 1968, former 23 U.S.C. (1970 ed.) 501 *et seq.*—the statute upon which the URA itself was modeled. See S. Rep. No. 91-488, *supra*, at 4-5; *Triangle Improve-*

ment Council v. *Ritchie*, 402 U.S. 497, 499-500 (1971) (Harlan, J., concurring); *id.* at 504 n.1 (Douglas, J., dissenting). The relocation provisions of the 1968 Highway Act provided a broad range of relocation assistance to those displaced by federally-funded state highway construction. However, the 1968 Act did not provide for relocation assistance to utilities that were required by highway construction to relocate their facilities from the public rights-of-way. The availability of such relocation assistance instead continued to be governed by 23 U.S.C. 123, enacted as part of the Federal-Aid Highway Act of 1958, which stipulates that federal funds may be used to pay utilities' relocation expenses *only* when state law already specifically so provides.[37]

Although Congress repealed the general relocation assistance provisions of the Federal-Aid Highway Act in their entirety at the time it passed the Uniform Relocation Act, it left Section 123 untouched. Thus, utilities that are required to relocate their facilities to accommodate federally-assisted highway construction are not eligible for relocation assistance unless state law expressly so provides. In view of Congress' sweeping and methodical repeal of other provisions of law that were inconsistent with or absorbed by the URA

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[37] 23 U.S.C. 123 provides in pertinent part that:

> (a) When a State shall pay for the cost of relocation of utility facilities necessitated by the contruction of a project on the Federal-aid primary or secondary system or on the Inter-state System, * * * Federal funds may be used to reimburse the State for such cost in the same proportion as Federal funds are expended on the project. Federal funds shall not be used to reimburse the State under this section when the payment to the utility violates the law of the State or violates a legal contract between the utility and the State.

(see H.R. Rep. No. 91-1656, 91st Cong., 2d Sess. 26-40 (1970)), it is difficult to believe that Congress would have left Section 123 standing if it contemplated provision of relocation benefits to all utilities displaced by federal or federally-assisted projects under the URA. Congress' failure to repeal Section 123 indicates its intention to leave the common law rule of compensation unaffected by the URA.[38]

2. That Congress did not intend in enacting the URA to require compensation of utilities for relocation expenses is also indicated by enactment less than two years later of the District of Columbia Public Utilities Reimbursement Act, Pub. L. No. 92-495, 86 Stat. 812. The express purpose of the Public Utilities Reimbursement Act was to require the compensation of utilities for relocation expenses that resulted from urban renewal and highway building projects in the District of Columbia. See S. Rep. No. 92-1254, 92d Cong., 2d Sess. (1972); H.R. Rep. No. 92-906, 92d Cong., 2d Sess. (1972). Congress passed the District of Columbia Public Utilities Reimbursement Act, notwithstanding the fact that pursuant to the URA the District of Columbia is deemed a "State" and the District of Columbia Redevelopment Land Agency, the

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[38] Whether amounts paid by states that, pursuant to *state* law, compensate utilities for their relocation expenses are includable within the federal share of the cost of particular projects (independently of the URA) turns upon the provisions of the particular federal grant program. The urban renewal regulations of the Department and Housing and Urban Development provide that such costs are allowable as a project expense, if, and only if, compensation is required under applicable state law, local ordinances or the terms of the franchise. *Urban Renewal Handbook* RHA 7209.1, ch. 2 (reproduced at page 63 of the amicus brief of the Boise Redevelopment Agency, filed in support of the petition for a writ of certiorari); see also J.A. 43.

local urban renewal agency for the District of Columbia, a "State agency." 42 U.S.C. 4601(2) and (4). Because the provisions of the URA covered the District of Columbia and its urban renewal activities, enactment of the District of Columbia Public Utilities Reimbursement Act would have been unnecessary if Congress believed that the Uniform Relocation Act already provided these relocation benefits to utilities.[39]

3. Under any standard, the determination of relocation costs incurred by a utility is complex. As we have already explained (pages 30-43), those costs are not comparable to the expenses of moving personal property faced by families and businesses that move. Moreover, in constructing new substitute facilities the utility acquires equipment that has a longer residual life than and is more valuable than, the lines displaced. See *United States* v. *564.54 Acres of Land*, 441 U.S. 506, 518 (1979) (White, J., concurring). In addition, the utility may receive some salvage value for part of its equipment removed from service. Significantly, whenever Congress has determined that utility relocation costs should be paid or reimbursed by a federal agency or its grantees, it has made explicit provision for deducting the enhanced value of the substitute facility and the salvage value of the old equipment from the cost of the substitute facility, in determining the "cost of relocation." See 23 U.S.C. 123(c); District of Columbia Public Utilities Reimbursement Act of 1972, Pub. L. No. 92-495, Sec-

[39] The effect of enactment of the District of Columbia Act is to make payment of utility relocation costs an eligible project cost for purposes of determining the federal share of the cost of any urban renewal project under HUD urban renewal regulations, see page 45 note 38, *supra*, and the federal share of any federally-assisted highway project pursuant to 23 U.S.C. 123.

tions 2 and 4, 86 Stat. 812-813. The absence of any comparable provision in the URA is yet another indication that Congress did not intend by the Act to require payment of relocation assistance to a public utility that relocates its lines in order to accommodate a public project.

CONCLUSION

The judgment of the court of appeals should be reversed.[40]

Respectfully submitted.

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MAY 1983

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[40] Although the Secretary defended HUD's action in this case in the district court and the court of appeals, we urged at the petition stage that the petition be denied, and suggested, moreover, that "the court of appeals' interpretation of the Act is a reasonable one" (Fed. Resp. Br. in Opp. 5). Having reexamined the merits, we are now persuaded, for the reasons stated above, that the decision below is erroneous. Moreover, because our argument rests directly upon the language of the schedule establishing the requirements for eligibility for relocation assistance, we now believe it entails no interpolation into the Act of an implied exclusion affecting "one form of business" (see page 36 n.31, *supra*; compare Fed. Resp. Br. in Opp. 5).

APPENDIX

The Uniform Relocation Assistance and Real Property Acquisition Policies Act, 42 U.S.C. 4601 *et seq*, provides in relevant part:

Section 101, 42 U.S.C. 4601:

As used in this chapter—

* * * * *

(6) The term "displaced person" means any person who, on or after January 2, 1971, moves from real property, or moves his personal property from real property, as a result of the acquisition of such real property, in whole or in part, or as the result of the written order of the acquiring agency to vacate real property, for a program or project undertaken by a Federal agency, or with Federal financial assistance; and solely for the purposes of sections 4622(a) and (b) and 4625 of this title, as a result of the acquisition of or as the result of the written order of the acquiring agency to vacate other real property, on which such person conducts a business or farm operation, for such program or project.

Section 202(a), 42 U.S.C. 4622(a):

(a) Whenever the acquisition of real property for a program or project undertaken by a Federal agency in any State will result in the displacement of any person on or after January 2, 1971, the head of such agency shall make a payment to any displaced person, upon proper application as approved by such agency head, for—

(1) actual reasonable expenses in moving himself, his family, business, farm operation, or other personal property;

(2) actual direct losses of tangible personal property as a result of moving or discontinuing a business or farm operation, but not to exceed an amount equal to the reasonable expenses that would have been required to relocate such property, as determined by the head of the agency; and

(3) actual reasonable expenses in searching for a replacement business or farm.

Section 210, 42 U.S.C. 4630:

Notwithstanding any other law, the head of a Federal agency shall not approve any grant to, or contract or agreement with, a State agency, under which Federal financial assistance will be available to pay all or part of the cost of any program or project which will result in the displacement of any person on or after January 2, 1971, unless he receives satisfactory assurances from such State agency that—

(1) fair and reasonable relocation payments and assistance shall be provided to or for displaced persons, as are required to be provided by a Federal agency under sections 4622, 4623, and 4624 of this title;

* * * * *

Section 213, 42 U.S.C. 4633:

(a) In order to promote uniform and effective administration of relocation assistance and land acquisition of State or local housing agencies, or other agencies having programs or projects by Federal agencies or programs or projects by State agencies receiving Federal financial assistance, the heads of Federal agencies shall consult to-

gether on the establishment of regulations and procedures for the implementation of such programs.

(b) The head of each Federal agency is authorized to establish such regulations and procedures as he may determine to be necessary to assure—

(1) that the payments and assistance authorized by this chapter shall be administered in a manner which is fair and reasonable, and as uniform as practicable;

(2) that a displaced person who makes proper application for a payment authorized for such person by this subchapter shall be paid promptly after a move or, in hardship cases, be paid in advance; and

(3) that any person aggrieved by a determination as to eligibility for a payment authorized by this chapter, or the amount of a payment, may have his application reviewed by the head of the Federal agency having authority over the applicable program or project, or in the case of a program or project receiving Federal financial assistance, by the head of the State agency.

(c) The head of each Federal agency may prescribe such other regulations and procedures, consistent with the provisions of this chapter, as he deems necessary or appropriate to carry out this chapter.

Section 217, 42 U.S.C. 4637:

A person who moves or discontinues his business, or moves other personal property, or moves from his dwelling on or after January 2, 1971, as

a direct result of any project or program which receives Federal financial assistance under title I of the Housing Act of 1949, as amended, or as a result of carrying out a comprehensive city demonstration program under title I of the Demonstration Cities and Metropolitan Development Act of 1966 shall, for the purposes of this subchapter, be deemed to have been displaced as the result of the acquisition of real property.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

NORFOLK REDEVELOPMENT AND HOUSING AUTHORITY,
A POLITICAL SUBDIVISION OF THE
COMMONWEALTH OF VIRGINIA,
Petitioner,

v.

THE CHESAPEAKE AND POTOMAC TELEPHONE COMPANY
OF VIRGINIA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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PETITIONER'S REPLY BRIEF ON THE MERITS

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TABLE OF CONTENTS

	Page
ARGUMENT	1
I. THE UNIFORM RELOCATION ACT DID NOT CONFER ON C&P THE BENEFITS CLAIMED IN THIS LITIGATION	1
A. C&P does not qualify under the plain language of the statute	2
1. C&P did not move personal property	3
2. C&P did not move or discontinue its business	4
B. Considering the URA in the setting of established law, its own terms, agency interpretations and related congressional action, commands the conclusion that C&P is not entitled to the claimed benefits	4
II. NRHA RESPONSES TO CERTAIN SPECIFIC ALLEGATIONS BY C&P	6
A. C&P version of the Question Presented	6
B. C&P now contends it has moved or discontinued its business	7
C. C&P asserts that the transmission lines are not real property	8
D. C&P alternatively seeks compensation for the facilities as realty	10
E. C&P asserts that the failure of the URA to mention utility relocation is not significant	11
F. The Michigan, Vermont, Rhode Island, Tennessee, Kansas, Indiana, Arkansas and Maryland cases cited by C&P are not in conflict with Petitioner's position	12
III. THE DECISION OF THE COURT OF APPEALS IMPROPERLY ALTERS LONG-STANDING RELATIONSHIPS BETWEEN STATES, LOCALITIES AND UTILITY COMPANIES	12

TABLE OF CONTENTS—Continued

Page

IV. THE URA WAS PASSED TO SUPPLEMENT THE FIFTH AMENDMENT REQUIREMENT OF COMPENSATION FOR THE TAKING OF PRIVATE PROPERTY, NOT TO PROVIDE COMPENSATION WHEN A PUBLIC WAY IS CLOSED OR TRANSMISSION LINES ARE MOVED FROM PUBLIC PROPERTY 13

CONCLUSION 15

TABLE OF AUTHORITIES

Cases

	Page
Alexander v. HUD, 441 U.S. 39 (1979)	2
Beaird-Poulan, Inc. v. Dep't. of Highways, 616 F.2d 255 (5th Cir. 1980), *aff'd. per curiam*, 441 F.Supp. 866 (W.D. La. 1977), *cert. denied*, 449 U.S. 971 (1980), *reh'g. denied*, 449 U.S. 1104 (1981)	11, 12
Cass v. United States, 417 U.S. 72 (1974)	2
City of Newport News v. Warwick County, 159 Va. 571, 166 S.E. 570 (1932)	8
District of Columbia v. Carter, 409 U.S. 418 (1973), *reh'g. denied*, 410 U.S. 959 (1973)	2
Harrison v. Northern Trust Co., 317 U.S. 476 (1943)	2
PEPCO v. Fugate, 211 Va. 745, 180 S.E.2d 657 (1971)	10, 14
Roberts Coal Co. v. Corder Co., 143 Va. 133, 129 S.E. 341 (1925)	10
Transcontinental Pipe Line Corp. v. Prince William County, 210 Va. 550, 172 S.E.2d 757 (1970)	8, 9
Truslow v. Bell, 166 Va. 608, 186 S.E. 71 (1936)	10
Whitman v. State Highway Comm'n, 400 F.Supp. 1050 (W.D. Mo. 1975)	11, 12

Statutes

The Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, 84 Stat. 1894, 42 U.S.C. §§ 4601-4655	*passim*
42 U.S.C. 4601(7)	8
42 U.S.C. 4622(a)(1)	3
42 U.S.C. 4622(a)(2)	3, 4
42 U.S.C. 4652	10, 11
Federal-Aid Highway Acts of 1956, 1958 and 1968, Pub. L. No. 84-627, 87 Stat. 250 (1956), Pub. L. No. 85-831, 72 Stat. 89 (1958) and Pub. L. No. 90-495, 82 Stat. 815 (1968)	5
District of Columbia Public Utilities Reimbursement Act of 1972, Pub. L. No. 92-495, 86 Stat. 812 (1972)	5

TABLE OF AUTHORITIES—Continued

Congressional Reports

	Page
House Select Subcomm. on Real Property Acquisition, *Study of Compensation and Assistance for Persons Affected by Real Property Acquisition in Federal and Federally Assisted Programs*, Committee Print No. 31, 88th Cong., 2d Sess. 1-25 (1964)	3
Uniform Relocation and Land Acquisition Policies —1970: Hearings on H.R. 14898, H.R. 14899, S.1 and Related Bills Before the House Comm. on Public Works, 91st Cong., 1st and 2nd Sess. 1026, 1031 (1969-1970)	3
Uniform Relocation Assistance and Land Acquisition Policies Act of 1969: Hearings on S.1. Before the Subcomm. on Intergovernmental Relations of the Senate Comm. on Governmental Operations, 91st Cong., 1st Sess. 164-69 (1969)	3-4
S. Rep. No. 98-71, 98th Cong., 1st Sess. (1983)	5, 6, 13, 14

Miscellaneous

2 Nichols, *Law of Eminent Domain* § 5.22[3] (3d ed. 1981)	11

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

Docket No. 81-2332

NORFOLK REDEVELOPMENT AND HOUSING AUTHORITY,
A POLITICAL SUBDIVISION OF THE
COMMONWEALTH OF VIRGINIA,
Petitioner,

v.

THE CHESAPEAKE AND POTOMAC TELEPHONE COMPANY
OF VIRGINIA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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PETITIONER'S REPLY BRIEF ON THE MERITS

ARGUMENT

I. THE UNIFORM RELOCATION ACT DID NOT CONFER ON C&P THE BENEFITS CLAIMED IN THIS LITIGATION.

The Respondent, the Chesapeake and Potomac Telephone Company of Virginia ("C&P"), has balanced its argument on the narrow issue formed in the following two statements:

> The question here presented is answered by the plain terms of the Act itself.
>
> . . . The statutory language directly applicable to C&P's claims is not susceptible of any interpretation which would exclude such claims.

Respondent's Brief on the Merits at 4, 5.

The Petitioner contends that C&P does not qualify under the plain language of the URA.[1] This conclusion is fortified when the statute is construed, as it should be,[2] in light of:

a) the common law existing at the time of its enactment;

b) the problem which Congress sought to correct in passing the URA;

c) the structure of the URA as a whole;

d) Federal agency interpretations of the URA subsequent to its passage; and

e) other Congressional action taken before and after passage of the URA.

A. C&P does not qualify under the plain language of the statute.

The pertinent elements of expense that are compensable for a displaced person under Section 202(a) of the URA are:

---

[1] The Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, 84 Stat. 1894, 42 U.S.C. §§ 4601-4655.

[2] This Court considered more than the plain language of the statute in *Alexander v. HUD*, 441 U.S. 39 (1979) when it was called on to construe the "written order" clause of the URA. In doing so the Court said:

> The statutory language is susceptible of either construction. However, an examination of Congress' purpose in adopting the relocation act, the legislative history of Section 101(6), and the structure of the act as a whole persuades us that HUD's interpretation more nearly reflects the intended scope of the assistance program.

See also *Cass v. United States*, 417 U.S. 72, 77-79 (1974); *District of Columbia v. Carter*, 409 U.S. 418, 420 (1973), *reh'g. denied*, 410 U.S. 959 (1973); *Harrison v. Northern Trust Co.*, 317 U.S. 476, 479 (1943).

(1) actual reasonable expenses in *moving* himself, his family, business, farm operation, or *other personal property*;

(2) actual direct *losses of tangible personal property as a result of moving or discontinuing a business* or farm operation, but not to exceed an amount equal to the reasonable expenses that would have been required to relocate such property, as determined by the head of the agency.

42 U.S.C. 4622 (a)(1) and (2) (Emphasis added).

1. *C&P did not move personal property.*

The utility company is not eligible for benefits under Section 202(a)(1). C&P did not move property, it abandoned property. Federal Respondent's Brief on the Merits at 30-32 and Joint App. 133-34, 150, 153-54. This abandonment cannot be construed as tantamount to a move under the URA because it was not the kind of expense the Congress sought to compensate.

The legislative history of the URA details the problems encountered by individuals who were forced to move their furniture without any compensation and the "Mom and Pop" businesses which had to gather up their stock in trade and move to another location, all without any compensation. The consistent and frequent references to such everyday problems, caused directly by the taking of private real property, strongly suggest that the Congress was concerned with, and legislated with respect to, those ordinary items of tangible personalty, not the massive concrete structures which C&P built and voluntarily left in place.[3]

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[3] See House Select Subcomm. on Real Property Acquisition, *Study of Compensation and Assistance for Persons Affected by Real Property Acquisition in Federal and Federally Assisted Programs*, Committee Print No. 31, 88th Cong., 2d Sess. 1-25 (1964); *Uniform Relocation and Land Acquisition Policies—1970: Hearings on H.R. 14898, H.R. 14899, S.1 and Related Bills Before the House Comm. on Public Works*, 91st Cong., 1st and 2nd Sess. 1026, 1031 (1969-1970); and *Uniform Relocation Assistance and Land*

The URA focuses on traditional concepts of land acquisition involving the power of eminent domain, and the normal, direct effect thereof on an individual or a business causing a displaced person to gather up its belongings and move to a new location. This sort of removal is not compensated in traditional eminent domain procedures; the Congress, thinking that to be unfair, enacted the URA to supplement compensation in eminent domain. This supplement did not benefit C&P, however, because C&P lost no property rights under the threat of condemnation.

2. C&P did not move or discontinue its business.

Nor did C&P suffer a direct loss of tangible personal property as a result of *moving or discontinuing a business.* 42 U.S.C. 4622 (a)(2). No part of the C&P business has been moved or discontinued.[4] Throughout the re-routing of the C&P lines, telephone service remained continuously available. Joint App. 154. The only change in the C&P operation was the re-routing of some transmission equipment to a new portion of the public street system in Norfolk.

Accordingly, there is no requirement under the "plain language" of the statute to pay any relocation expenses to C&P.

B. Considering the URA in the setting of established law, its own terms, agency interpretations and related congressional action, commands the conclusion that C&P is not entitled to the claimed benefits.

In the Petition for Certiorari and in its Brief on the Merits the Petitioner has argued that:

Acquisition Policies Act of 1969: Hearings on S.1. Before the Subcomm. on Intergovernmental Relations of the Senate Comm. on Governmental Operations, 91st Cong., 1st Sess. 164-69 (1969).

[4] As to this point, it is noteworthy that the C&P complaint in the District Court sought compensation only for moving personal property. It did not allege that it had discontinued its business. Joint App. 7-14.

a) Under the common law of most states, including Virginia, at the time of passage of the URA, a utility company was obligated to move its transmission lines from a public way at its expense.

b) Neither the URA nor its legislative history make any express provisions for reimbursement of the costs of such relocation.

c) The Federal agencies which administer the URA make no provision in their regulations for such reimbursement, and the HUD regulations deny such payments unless required under state law.

d) When Congress wanted to cover utilities, as it did in the Federal-Aid Highway Acts and the District of Columbia Public Utilities Reimbursement Act of 1972,[6] the matter was discussed in committee reports and dealt with explicitly in the statutes.

Since the Petitioner's Brief on the Merits was prepared the Senate has once again dealt with this problem; and once again it has been very specific. S. 531, the Uniform Relocation Act-Amendments of 1983, was passed by the Senate on May 20, 1983. The bill provides explicitly for the reimbursement of the cost of relocating utility company transmission lines where such relocation is caused by a wholly Federal project, but where the relocation is caused by a federally-assisted program S. 531 leaves the matter of such reimbursement to state law. The Committee Report describes the provision of assistance to utilities in Federal programs as *expanding* the definition of a "displaced person." S. Rep. No. 98-71, 98th Cong., 1st Sess. 11 (1983). The provisions leaving to state law the displacement of utilities in federally-assisted pro-

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[6] The Federal-Aid Highway Acts of 1956, 1958 and 1968 are Pub. L. No. 84-627, 87 Stat. 250 (1956), Pub. L. No. 85-831, 72 Stat. 89 (1958) and Pub. L. No. 90-495, 82 Stat. 815 (1968). The District of Columbia Public Utilities Reimbursement Act of 1972 is Pub. L. No. 92-495, 86 Stat. 812 (1972).

grams reflects "current relocation practices of the Federal, State and local agencies covered under this act". *Id.* at 56. The provisions of S. 531 relating to utilities were deemed necessary to correct the error of the United States Court of Appeals for the Fourth Circuit in the instant case. *Id.* at 57.

Thus, in each instance where Congress intended to deal with the relocation of transmission lines, it has been very explicit. This strongly suggests that silence as to this matter in the language of the URA, and in its legislative history, indicates that Congress did not intend to deal with the complex problem of relocating utility transmission lines. The common law of the several states takes care of this situation, and there is no indication of an intention on the part of Congress to change established state law.

II. NRHA RESPONSES TO CERTAIN SPECIFIC ALLEGATIONS BY C&P.

Petitioner has anticipated and answered most of the C&P contentions in its Petition and its Brief on the Merits, but there are certain specific contentions set out in Respondent's Brief which petitioner must challenge.

A. C&P version of the Question Presented.

The C&P version of the Question Presented attempts to disassociate C&P from any obligations under its Franchise Agreement, denying that its relocation was effected from "public rights-of-way." The record is not clear as to what human being, if any, actually asked C&P to relocate its lines. The need to relocate was so obvious that it is likely that no one ever articulated a request. The record *is* clear that C&P, the City of Norfolk and NRHA engaged in a cooperative undertaking designed to accommodate the re-routing of public and private utilities from one public space to another with the least inconvenience. Joint App. 164-81. C&P was normally advised of a street closing in advance by the City. Joint App.

106. The ultimate location of its lines had to be compatible with the redevelopment project and C&P acquiesced in the planned relocation whether asked by Norfolk or by NRHA. Joint App. 135-36. Well before the streets were closed, C&P, the City and NHRA employed the same engineers to plan the new locations within the new rights-of-way. Joint App. 177-80. The entire rerouting of lines was from one location in public property to another public location, and it was done under the pattern of rights and obligations which were established by the Franchise Agreement and the common law. C&P knew it must relocate its lines to maintain continuous service, Joint App. 154, and no indication was given until considerably later that it wanted or expected reimbursement.

B. C&P now contends it has moved or discontinued its business.

C&P argues that it qualifies for benefits as a person who "moves" or "discontinues his business." Respondent's Brief on the Merits at 6. Obviously, C&P has not *moved* or *discontinued* its business and Petitioner has noted *supra.* Note 4, that this assertion was not contained in C&P's original complaint. What C&P did was to construct new vault-manholes and conduits and install new cable in the new street rights-of-way.[6] The utility at-

---

[6] Richard Tucker, Field Engineer for C&P, described the process as follows:

> A. The first thing is the manholes are constructed to verify that we have them in a usable location. And the conduit is placed between the manholes, new cable is pulled in those sections, and then the new cable is cut at either end into what is going to remain, and the old cables are pulled out. The old conduit, or the old manholes are covered up and the job is completed.
>
> Q. But does the service continue?
>
> A. The services always continue.

Joint App. 153, 154.

tempts to evade this fact by arguing that Section 101 of the URA defines the word "business" to mean any lawful activity, 42 U.S.C. 4601(7), and that when it discontinues any lawful activity (i.e., a transmission line) it discontinues its business. This is manifestly not what Congress had in mind when it referred to discontinuing a business. Instead, Congress sought to cure the disproportionate burdens on the small businessman who must discontinue his sole means of livelihood and move his stock in trade to a new location.

While C&P asserts that "the language of these provisions is in no way capable of being read as having two or more possible meanings . . . .", Respondent's Brief on the Merits at 7, it seeks to distort the meaning of the term "move or discontinue his business" to include a situation in which there is no business which is moved or discontinued.

C. C&P asserts that the transmission lines are not real property.

Petitioner disputes C&P's bald assertion that "[i]t is not the law of Virginia or of any other state that utility lines built in public streets are real property." Respondent's Brief on the Merits at 9. To the contrary, the Supreme Court of Virginia held that this is the law of Virginia in *City of Newport News v. Warwick County*, 159 Va. 571, 603, 166 S.E. 570, 581 (1932). There the Virginia court ruled that a system of waterworks consisting of water mains, gates, hydrants and connecting pipes were fixtures attached to the land and had become realty. Part of the system was installed under land owned in fee by the utility and part beneath the public highway. The entire system was classified as realty.

Each side has relied on *Transcontinental Pipe Line Corp. v. Prince William County*, 210 Va. 550, 172 S.E.2d 757 (1970) in support of its interpretation of the proper classification of the underground facilities. NRHA ar-

gues that *Transcontinental* declares that utility lines imbedded in the earth become a part of the realty. C&P argues that this is only true when the utility owns the realty. Yet on April 21, 1972, C&P wrote the Commissioner of Revenue of the City of Norfolk, saying:

> As we discussed at our Tuesday meeting, it is the Company's position that a proper application of the rule of the *Transcontinental* case requires that the following company property be reclassified as real property:
>
> pole lines
> conduit
> wire lines
> central office equipment

Joint App. 293-94.

Thus in 1972, two years after passage of the URA, C&P confirmed that the facilities involved in this litigation were in fact realty, meeting the tests set out in *Transcontinental.* At that time C&P sought to reduce its taxes. It now adopts a reversed position in order to obtain a windfall payment under the URA.

These communication facilities are massive. Cables measuring one to three inches in diameter, holding as many as 3600 individual wires, are pulled through plastic conduits about four inches in diameter which have been laid in groups of up to twenty pipes in pipeways some fourteen to sixteen inches wide and three feet deep. The pipeways run between concrete vaults buried in the ground which are accessible from the surface of the street through manholes. The concrete vaults are about twelve feet long, six feet wide, seven feet deep on the inside and about a foot thick. The cables are probably the part of the system most likely to deteriorate, but they have an expected life of about forty years and are put in place to stay there for that length of time. Joint App. 97, 110-22, 131. Certainly for the purposes of the URA these

structures are not the sort of property contemplated by the Congress when it sought to alleviate the burden on individuals and businessmen who had to pack up and move items of personal property from one location to another.

D. C&P alternatively seeks compensation for the facilities as realty.

C&P, for the first time on page 33 of its Brief on the Merits, asserts that if the facilities are not personalty, then they must be treated as realty under 42 U.S.C. 4652. One flaw in this argument is that C&P did not own the land into which the facilities were placed, and when the facilities became a part of that realty they were not a part of C&P realty. It is the law in Virginia that buildings and improvements annexed to realty become a part of that realty and inure to the benefit of the owner of that realty. *Truslow v. Bell*, 166 Va. 608, 617, 186 S.E. 71, 74 (1936). Only when a person puts improvements on land belonging to another, under a *bona fide* belief that he has good title to that land, is he entitled to compensation for those improvements. *Roberts Coal Co. v. Corder Co.*, 143 Va. 133, 140-41, 129 S.E. 341, 344 (1925).

Another flaw in C&P's argument is that it ignores the true nature of the franchise and the rights conferred thereby on C&P. We have cited *PEPCO v. Fugate*, 211 Va. 745, 180 S.E.2d 657 (1971), as holding that a franchise, such as the one under which C&P and its predecessors located their lines, creates no property rights. The text writers are in accord.

> . . . [W]hen a franchise is, by its terms, . . . expressly subject to the right to amendment, alteration or repeal by the legislature, an amendment, alteration or repeal of the franchise, however much pecuniary loss it may inflict upon the holders of the franchise, is not a taking of their property in the constitutional

sense because they had no property right in an irrevocable franchise.

2 Nichols, *Law of Eminent Domain* § 5.22[3] (3d ed. 1981).

In this case, where the franchise was revocable, C&P never acquired any property rights. C&P is not entitled to any compensation under 42 U.S.C. 4652.

E. C&P asserts that the failure of the URA to mention utility relocation is not significant.

C&P argues that lack of any specific reference in the URA to utility relocation is not significant. Respondent's Brief on the Merits at 17. Respondent asserts that a particular element of relocation expense can be eligible even though not specifically mentioned in the URA, citing as examples: *Beaird-Poulan, Inc. v. Dep't. of Highways*, 616 F.2d 255 (5th Cir. 1980), *aff'd. per curiam*, 441 F.Supp. 866 (W.D. La. 1977), *cert. denied*, 449 U.S. 971 (1980), *reh'g. denied*, 449 U.S. 1104 (1981); and *Whitman v. State Highway Comm'n*, 400 F.Supp. 1050 (W.D. Mo. 1975).

Beaird-Poulan permitted recovery of the costs of moving manufacturing and assembly operations of a chain saw plant to a new site. The move was caused by acquisition of three acres of Beaird-Poulan property, which rendered the remaining site too small for needed and planned expansion. No part of the Beaird-Poulan plant was located on the three acres actually acquired. C&P argues that because the *Beaird-Poulan* court allowed removal costs caused by a taking of property other than that on which the plant was situate, the language of the URA is broad enough to cover the costs of a utility company in moving its lines from public property.

Beaird-Poulan is distinguishable from the instant case because it involved moving personal property as a direct result of the acquisition of claimant's land. Hence *Beaird-Poulan* is consistent with the position of NRHA.

No land was acquired from C&P. The real significance of *Beaird-Poulan* is that the court looked at the legislative history and the congressional purpose behind the URA to determine what the "plain" language of the statute meant. In the case *sub judice*, C&P argues against any such logical reference to the legislative history or the purpose of Congress when it passed the URA.

Whitman logically held that billboards were "structures" within Section 302 of the URA and required the Highway Commission to acquire the billboards along with the land on which they stood. The billboards were real estate for the purposes of the URA. There is no benefit to C&P in *Whitman*. The court found that the claimant had a leasehold property interest. In this case, C&P has no compensable real property interest. In *Whitman* as in *Beaird-Poulan*, the court did not restrict itself to the plain language of the statute, but looked to the legislative history as an aid in determining the intent of Congress.

F. The Michigan, Vermont, Rhode Island, Tennessee, Kansas, Indiana, Arkansas and Maryland cases cited by C&P are not in conflict with Petitioner's position.

Respondent's reliance on the several state court decisions referred to at pages 22 and 23 of its Brief on the Merits is misplaced. These cases all recognized the common law rule relied upon by the Petitioner, but in each instance the court held that a state statute had changed the common law. This is consistent with Petitioner's argument.

III. THE DECISION OF THE COURT OF APPEALS IMPROPERLY ALTERS LONG-STANDING RELATIONSHIPS BETWEEN STATES, LOCALITIES AND UTILITY COMPANIES.

C&P is a privately owned, for profit, state controlled utility providing telephone service to its subscribers in the state of Virginia. The company's income is derived from

charges permitted under a rate system approved by the State Corporation Commission. The nature of the rate making process was described in the Brief Amicus Curiae filed by the National Institute of Municipal Law Officers (NIMLO) at pages 8 and 9. Rate making is a finely tuned, complex process with considerable state and local, economic and political overtones. One of the assumptions on which this process depends is that although the utility will not have to pay for the privilege of placing its lines in the public streets of a locality, it will have to pay to relocate or re-route those lines when requested to do so by the locality, and the approved rates must provide funds to meet this expense. A few other states, and even one locality in Virginia, do not follow this rule; but the rule they do follow is well known and is established by express language used by the appropriate legislative body. As NIMLO argues, any change in these state and local rules should be made by the legislatures, not the courts. NIMLO Brief on the Merits at 10, 11.

IV. THE URA WAS PASSED TO SUPPLEMENT THE FIFTH AMENDMENT REQUIREMENT OF COMPENSATION FOR THE TAKING OF PRIVATE PROPERTY, NOT TO PROVIDE COMPENSATION WHEN A PUBLIC WAY IS CLOSED OR TRANSMISSION LINES ARE MOVED FROM PUBLIC PROPERTY.

The Senate Committee on Governmental affairs, in its Report to Accompany S. 531, specifically commented that the URA was restricted to acquisitions which are supported by eminent domain. S. Rep. No. 98-71, 98th Cong., 1st Sess. 57 (1983). The exercise of the power of eminent domain is directed at the acquisition of private property for public purposes. In such cases the Fifth Amendment requires just compensation for the taking, but not for the incidental but predictable expense of moving personal property because of such taking. The heart of the matter is the acquisition of private property.

The leadership of the Senate Committee took unusual pains to set out their views on the question of utility relocation expenses and appended a carefully prepared statement to the Committee Report, which included the following:

> It is just such a distinction that the committee believes the Fourth Circuit Court of Appeals failed to apply in the case, C&P Telephone v. Norfolk Housing and Redevelopment Authority, et al (Norfolk). In Norfolk the court held that the acquisition triggering C&P's displacement occurred when NHRA, a State agency, used Federal funds to acquire the private property abutting the city of Norfolk's easement, which C&P's transmission lines occupied. When NHRA subsequently ordered C&P to vacate the property following the city's closing of the street, C&P became, in the court's eyes, a displaced person, eligible for a relocation payment under this section. The ruling overlooked, however, the question of whether NHRA could have forced the city to vacate its duly acquired easement. Assuming it could not (NHRA's eminent domain powers being the same as the city's), the transfer of control over the property between the city and NHRA constituted an unencumbered transaction on the open market. The committee observes that only acquisitions which are supported by eminent domain are presently covered under the act. *Ibid.*

Viewing the instant case from the standpoint of land acquisition, there is no basis for the C&P claim. While NRHA did acquire private real property, it did not acquire any from C&P. The acquisition occurred when NRHA purchased or condemned the parcels of land abutting the public streets. This acquisition had no effect on any C&P rights derived from the Franchise with the city. Under Virginia law this franchise created no compensable property rights in C&P. *PEPCO v. Fugate*, 211 Va. 745, 180 S.E.2d 657 (1971). Hence, no benefits are payable to C&P under the URA.

CONCLUSION

The judgment of the Court of Appeals is wrong, and should be reversed. If the opinion is allowed to stand there will be a substantial shift in the purposes for which federal funds are spent and an unexpected burden on local governments without any legislative judgment that these changes are in the best interests of the public. The C&P claim should be denied.

Respectfully submitted,

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No. 81-2332

In the Supreme Court of the United States

OCTOBER TERM, 1983

NORFOLK REDEVELOPMENT AND HOUSING AUTHORITY, ETC., PETITIONER

v.

CHESAPEAKE AND POTOMAC TELEPHONE COMPANY OF VIRGINIA, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

REPLY MEMORANDUM FOR THE FEDERAL RESPONDENT URGING REVERSAL

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TABLE OF AUTHORITIES

Page

Cases:

Metropolitan Edison Co. v. *People Against Nuclear Energy*, No. 81-2399 (Apr. 19, 1983) 3

United States v. *564.54 Acres of Land*, 441 U.S. 506 5

Statutes:

Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, 42 U.S.C. 4601 *et seq.* 1

Section 101(6), 42 U.S.C. 4601(6) 2

Section 202(a)(1), 42 U.S.C. 4622(a)(1) 2

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Section 302, 42 U.S.C. 4652 4

Miscellaneous:

129 Cong. Rec. (daily ed. May 20, 1983):

S7249 2

S7250 (Section 202(d)) 2

S. 531, 98th Cong., 1st Sess. (1983) 2

In the Supreme Court of the United States

OCTOBER TERM, 1983

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NORFOLK REDEVELOPMENT AND HOUSING AUTHORITY, ETC., PETITIONER

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CHESAPEAKE AND POTOMAC TELEPHONE COMPANY OF VIRGINIA, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

REPLY MEMORANDUM FOR THE FEDERAL RESPONDENT URGING REVERSAL

In our opening brief we explained that neither the language nor the legislative history of the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, 42 U.S.C. 4601 *et seq.*, evinces any intention on the part of Congress to abrogate the prevailing common law rule under which a utility that locates its lines in a public right-of-way pursuant to a municipal license is expected to relocate its lines at its own expense when public convenience or necessity so requires. Several points raised by respondent warrant brief comment.

1. Respondent misapprehends (Br. 7-8) our argument (HUD Br. 30-32) that it has not "move[d]" any of the equipment that constituted its lines in their former location to their new location, and accordingly cannot qualify as a

"displaced person" under Section 101(6) of the Act, 42 U.S.C. 4601(6). The flaw we identified in respondent's claim is not, as respondent suggests, that it reaped the salvage value of the electrical cables it removed from service, but that neither those cables, nor any other part of the equipment in use in the former lines, was employed at the new locations. Thus, contrary to respondent's suggestion (Br. 7), our argument creates no incentive to waste salvage value.

2. Respondent does not respond directly to our argument (HUD Br. 33-40) that the *construction* of new utility lines is so far outside the ordinary meaning of the statutory term "mov[ing] * * * personal property" (Section 101(6), 42 U.S.C. 4601(6); see also Section 202(a)(1), 42 U.S.C. 4622(a)(1)) that Congress should not be understood thereby to have swept away the settled rule of state law placing relocation costs on utilities, absent some affirmative evidence of legislative intent to accomplish that result. Instead, respondent now relies (Br. 8) on other language in the pertinent provisions referring to one who "moves" himself. But this alternative statutory formulation is no more susceptible of the reading respondent urges than the statutory language addressed to moving of personal property. Neither can fairly be read to contemplate the kind of capital *construction* for which respondent seeks compensation.[1] Certainly, neither is sufficiently clear that it should be read to abrogate established doctrine and unsettle existing relationships.[2]

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[1]Respondent appears to concede (Br. 17), albeit by indirection, that, as we have suggested (HUD Br. 40-42), at least a significant part of its claim is for the cost of construction.

[2]We note the pendency of S.531, 98th Cong., 1st Sess., which would amend the Act so as to explicitly address the status of utilities thereunder. As passed by the Senate on May 20, 1983, the bill would make clear that no relocation assistance is due in the circumstances of this case. See 129 Cong. Rec. S7249, S7250 (Section 202(d)) (daily ed.

In any event, it is scarcely clear that respondent has "moved" itself in the sense Congress contemplated in the language upon which respondent relies. Undoubtedly, this language, coupled with Section 202(a)(2), 42 U.S.C. 4622(a)(2), provides for the situation in which transfer of tangible property that was in service in a former location —as, for instance, a commercial establishment — is not economically efficient. But even in the unusual situation in which not a single item of personal property is transferred, the most important asset of many commercial establishments — intangible good will — is "move[d]" when premises such as an office or a store are relocated. But the relocation of isolated utility lines, which have no associated good will, and have no value separate and apart from the rest of the distribution network and switching equipment to which they are attached, can scarcely be regarded as the moving of a discrete business entity. And respondent offers no evidence that this was within the scope of congressional contemplation. Undoubtedly, if one were to "seize the word" at issue — "moves" — "out of its context and give it the broadest possible definition" (*Metropolitan Edison Co.* v. *People Against Nuclear Energy*, No. 81-2399 (Apr. 19, 1983), slip op. 5), respondent's interpretation might be a colorable one. But the tools of statutory interpretation do not include the shoehorn; the object of the enterprise is simply to discern Congress's intent.

3. Respondent insists (Br. 9-15) that all of its facilities removed or abandoned in place were tangible personal property. For the reasons previously stated (HUD Br. 32-33 n.29) — which respondent has not addressed — it is highly

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May 20, 1983). The detailed provisions of the proposed amendment to the Act providing for payment of relocation assistance to utilities in certain other circumstances stand in marked contrast to the bare language of the present statute upon which respondent relies (see HUD Br. 46-47).

unlikely that this is a correct reading of the controlling Virginia law as to respondent's permanently installed conduits, and especially as to its manholes, which resemble nothing so much as underground buildings. But even if respondent were correct in its reading of state law, the unique and marginal nature of the equipment involved, which has many of the attributes of immovable fixtures, suggests that Congress never contemplated the application of the Act to construction of substitute facilities for utility lines located pursuant to municipal licenses in the public streets.[3]

4. Respondent now suggests (Br. 33-34) that if our interpretation of the relocation assistance provisions of the Act should prevail, Section 302 of the Act, 42 U.S.C. 4652, would require the displacing agency to condemn and pay just compensation for the utility equipment abandoned in place. As with respondent's main argument, it is acknowledged that this result was not within Congress's objectives. Respondent nevertheless suggests that the plain statutory language allows no other conclusion — however unintended the result may be.

We cannot agree. Section 302 does not directly address the question of *compensation* at all. Rather, it assures the owners of buildings and real property interests located on condemned land that they are not left with an unusable remnant, by requiring that their interests, too, be *acquired*. But it is settled state law that respondent simply had no

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[3]Although Congress seems to have assumed that state law would delineate fixtures from movable personalty for purposes of the Act, it seems unlikely that Congress intended to allow so significant a question as the reimbursability of utility relocation costs to turn on the vagaries of state law adopted for other purposes.

compensable real property interest in the street locations it formerly occupied (see HUD Br. 21-24). Accordingly, there is nothing to be acquired here and no compensation is due.[4]

For the foregoing reasons and those stated in our opening brief, it is respectfully submitted that the judgment of the court of appeals should be reversed.

REX E. LEE
Solicitor General

SEPTEMBER 1983

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[4]To the extent that respondent's equipment became affixed to the land under state law, it may be regarded as real property. But that interest is not a compensable one under state law. In any event, the measure of compensation for any such acquisition would not be the cost of substitute facilities — the measure claimed here. See *United States* v. *564.54 Acres of Land*, 441 U.S. 506 (1979).

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NO. 81-2332

IN THE

Supreme Court of the United States

OCTOBER TERM 1982

NORFOLK REDEVELOPMENT AND HOUSING AUTHORITY,

Petitioner,

v.

THE CHESAPEAKE AND POTOMAC TELEPHONE COMPANY OF VIRGINIA,

Respondent.

On Writ of Certiorari to the U.S. Court of Appeals for the Fourth Circuit

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF THE AMERICAN GAS ASSOCIATION

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

Pursuant to Supreme Court Rule 36, the American Gas Association (A.G.A.) hereby respectfully requests permission to file its brief *amicus curiae* in support of the Respondent in the above-captioned case. This motion is necessary because while Respondent granted permission for A.G.A. to file its brief, the Petitioner declined to grant its consent.

A.G.A. is the national trade association for approximately 250 member companies providing natural gas transmission and distribution services to over 160 million consumers. These companies are affected greatly by urban redevelopment projects such as that implemented by the Norfolk Redevelopment and Housing Authority (NRHA), which require the relocation of transmission facilities.

This case presents issues of statutory interpretation the resolution of which will determine whether the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, 42 U.S.C. §§4601-4655 (URA) provides relief in

the form of reimbursement to utilities forced to relocate lines as a result of these projects.

A.G.A. submits that, at least under the circumstances in this case, the URA does provide *limited* relief. We stress the limited aspect of this relief because of Petitioner's contentions that allowing reimbursement here will have a harsh and adverse nationwide impact.

The provisions of the URA apply in only limited circumstances. For instance, a utility which relocates as a result of any project that does not require an acquisition of property, such as a sewer construction or highway reconstruction project, could not come within the provisions of the act. Further, under the laws of some states, utility lines, once in place, are not considered the "personal property" of the company; thus, upon relocation the utility will not be moving its "personal property," as required by the statute. *See* 42 U.S.C. 4601(6). Consequently, allowing reimbursement here will not affect every federally-funded project in the nation.

Further, because the public utilities involved in these activities are generally regulated, the ultimate question here is whether relocation costs are to be borne by the utilities customers alone or by the taxpayers in general (the two groups do not always coincide). The failure to reimburse utility relocation costs will impose an inequitable burden on ratepayers, especially the poor and elderly who are least able to pay these costs.

A.G.A. is not asking, nor do its members expect, reimbursement of costs for every relocation undertaken as a result of a federally-funded project. Moreover, we do not believe that the URA covers every such displacement. A.G.A. submits, however, that the facts of this case, taken in light of the plain language of the URA, mandate allowance of relocations cost in this instance.

WHEREFORE, the American Gas Association respectfully moves that this Court grant permission to file its brief

amicus curiae, attached hereto, in support of the position of the Respondent.

Respectfully submitted,

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BRIEF AMICUS CURIAE OF THE AMERICAN GAS ASSOCIATION

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TABLE OF CONTENTS

	Page
I. INTEREST OF AMICUS CURIAE	1
II. STATEMENT OF THE CASE	4
III. ARGUMENT	5
A. THIS COURT NEED NOT DECIDE WHETHER THE URA CHANGES THE TRADITIONAL COMMON LAW RULE REGARDING UTILITY RELOCATIONS BECAUSE THE COMMON LAW WOULD NOT APPLY IN THIS CASE EVEN ABSENT THE URA	5
B. ABSENT CLEAR LEGISLATIVE INTENT TO THE CONTRARY, A COURT MUST APPLY THE PLAIN LANGUAGE OF A STATUTE; HERE, C&P MEETS ALL STATUTORY REQUIREMENTS TO QUALIFY AS A "DISPLACED PERSON"	6
1. There is no indication of congressional intent to exclude utilities from URA courage	6
2. C&P moved its personal property as a result of the NRHA acquisition	7
CONCLUSION	10

TABLE OF AUTHORITIES

	Page
Baltimore v. *Baltimore Gas & Electric Co.*, 232 Md. 123, 192 A.2d 87 (1963)	5
Bangor-Hydro Electric Co. v. *Johnson*, 226 A.2d 371 (Me. 1967)	8
Chesapeake & Potomac Telephone Co. v. *Landrieu*, 674 F.2d 298 (4th Cir. 1982)	5-6,7
City of Newport News v. *Warwick County*, 159 Va. 571, 166 S.E. 570 (1932)	9
Consumers Power Co. v. *Costle*, 615 F.2d 1147 (6th Cir. 1980)	2
Danville Holding Corp. v. *Clement*, 178 Va. 223, 16 S.E.2d 345 (1941)	8
Mullins v. *Sturgill*, 192 Va. 653, 66 S.E.2d 483 (1951)	9
New Orleans Gas Light Co. v. *Drainage Commission of New Orleans*, 197 U.S. 453 (1905)	5
Port of New York Authority v. *Hackensack Water Co.*, 195 A.2d 1 (N.J. 1963)	5
Potomac Electric Power Co. v. *Fugate*, 211 Va. 745, 180 S.E.2d 657 (1971)	5
Transcontinental Gas Pipe Line Co. v. *Prince William County*, 210 Va. 55, 172 S.E.2d 757 (1970)	8,9
United Electric Light v. *Deliso Const. Co.*, 52 N.E.2d 553 (Mass. 1943)	9

Page

STATUTES

Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, 42 U.S.C. §4601-4655 ..... 2,4,7-8, 9,10

District of Columbia Public Utilities Reimbursement Act of 1972, Pub.L. No. 92-495, 86 Stat. 812 (1972) 6,7

Federal-Aid Highway Act of 1956, Pub.L. No. 627, 87 Stat. 250 (1956) 6

REGULATIONS

24 C.F.R. §42.40(m) (2) 8

REPORTS

116 CONG. REC. 40170 (1970) 3

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Respondent.

On Writ of Certiorari to the U.S. Court of Appeals for the Fourth Circuit

BRIEF AMICUS CURIAE OF THE AMERICAN GAS ASSOCIATION

I. INTEREST OF THE AMICUS CURIAE

This brief *amicus curiae* in support of the Respondent is submitted by the American Gas Association (A.G.A.), a non-stock, non-profit corporation organized under the laws of the state of Delaware. A.G.A. is the national trade association for approximately 250 member companies providing natural gas transmission and distribution services to over 160 million consumers. The member companies of A.G.A. provide approximately 85 percent of the nation's natural gas utility sales and 43 percent of the total energy consumed in the United States by residential and commercial establishments.

The member companies of A.G.A. are affected greatly by urban redevelopment projects such as that implemented by the Norfolk Redevelopment and Housing Authority (NRHA)

in the city of Norfolk, Virginia. Utilities must relocate not only when street patterns will be changed and existing rights-of-way altered, as here, but for projects requiring excavation near and around gas mains, such as sewer construction and road reconstruction. In most cases,[1] such relocation is done solely at the cost of the utility, and ultimately, its ratepayers.

The Uniform Relocation and Real Property Acquisition Policies Act of 1970, 42 U.S.C. §§4601-4655 (1976) (URA), however, provides limited relief to utilities affected by such projects. We stress the limited aspect of this relief because of Petitioner's contentions that allowing reimbursement in this case will have a harsh and adverse nationwide impact. This is simply not true.

As we will show in more detail *infra*, the provisions of the URA apply in only limited circumstances. These circumstances, however, are present in only a small percentage of the relocations that utilities are forced to implement every year. For instance, a utility that relocates as a result of any project not requiring an acquisition of property, such as a sewer construction or highway reconstruction project, could not come within the provisions of the act.[2] Further, under the laws of some states,[3] utility lines, once in place, are not considered the "personal property" of the company; thus, upon relocation the utility will not be moving its "personal property," as required by the statute. *See* 42 U.S.C. 4601(6). Consequently, allowing reimbursement here will not affect every

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[1] Certain acts of Congress, *see* n.11 *infra*, provide for reimbursement of utility relocation costs, and in some states, limited reimbursement is allowed. *See, e.g.* City of Center Line v. Michigan Bell Telephone Company, 26 Mich. App. 655, 182 N.W.2d 769 (1970), *aff'd*, 387 Mich. 360, 196 N.W.2d 144 (1972); Mich. Stat. Ann. §5.3501 (Callaghan 1969).

[2] *See Consumers Power Co.* v. *Costle*, 615 F.2d 1147 (6th Cir. 1980) (where sewer construction project did not require acquisition of land, gas company cannot recover under URA).

[3] In Michigan and New York, for example, a special franchise or consent granted by the state or a municipality to a utility company to place, maintain and operate its facilities in public streets represents an interest in real property. Upon relocation, a utility would not be relinquishing this interest because there is no right to a *fixed location* in the public streets. *See Consumers Power*, 615 F.2d at 1149.

federally-funded project in the nation. Because the utilities will be reimbursed by federal and local authorities in proportion to that share of the total project cost borne by each, the fear that "[a]lready strained municipal budgets will be further impacted [*sic*] by the unexpected payments."[4]

All utilities have an interest in keeping the costs of service to their customers as low as possible. Because the public utilities involved in these activities are generally regulated, the ultimate question here is whether relocation costs are to be borne by the utilities' customers alone or by the taxpayers in general (the two groups do not always coincide). The failure to reimburse utility relocation costs will impose an inequitable burden on ratepayers, especially the poor and elderly who are least able to pay these costs. As the Department of Housing and Urban Development noted in its Petition in Opposition to Certiorari at 6, "[i]t is reasonable to include all the expenses of redevelopment projects in the cost of the project itself, rather than to pass along some of these expenses to the utility's customers, in what amounts to a hidden tax." Thus, at least in the limited circumstances under which the URA allows reimbursement of these costs, utility customers alone will not be forced to bear the costs of projects which benefit the community as a whole.[5]

A.G.A. is not asking, nor do its members expect, reimbursement of costs for every relocation undertaken as a result of a federally-funded project. Moreover, we do not believe that the URA covers every such displacement. A.G.A. submits, however, that the facts of this case, taken in light of the plain language of the URA, mandate allowance of relocation costs in this instance.

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[4] Brief of Petitioner at 40.

[5] In fact, the legislative history of the URA supports the proposition that "the few should not be made to pay unfairly for the progress that will benefit the many." 116 CONG. REC. 40170 (1970) (Remarks of Representative Johnson).

II. STATEMENT OF THE CASE

Respondent Chesapeake and Potomac Telephone Company of Virginia (C&P) brought suit in the U.S. District for the Eastern District of Virginia against Norfolk Redevelopment and Housing Authority (NRHA) and the Secretary of Housing and Urban Development (HUD) seeking reimbursement for the relocation of its telephone lines, cables, conduits, and related equipment, which was necessitated by federally-aided redevelopment projects in Norfolk, Virginia. The basis for the claims was the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, which provides that "[w]henever the acquisition of real property for a [federally assisted] project . . . will result in the displacement of any [individual or corporation]", such displaced person shall be paid the "actual reasonable expenses in moving [the individual's or corporation's] personal property . . ." 42 U.S.C. §§4622(a)(1) and 4601(5) and (6).

The district court denied relief, holding that public utilities were not included within the reimbursement provisions of the Act. This conclusion was based on the common law rule that utilities must relocate at their own cost when directed by public authorities to move property from public rights-of-way. The court found nothing in the Act or its legislative history to show that Congress intended to change this rule. The court also noted that utilities can retrieve these costs through their rate structures.

The United States Court of Appeals for the Fourth Circuit reversed this ruling and remanded for further proceedings. The court rejected the common law argument, finding that the Act's plain language would apply in the absence of any clear legislative intent to exclude utilities. The court then determined that C&P met the statutory requirements for a "displaced person" and accordingly ruled that C&P was entitled to reimbursement of its relocation costs.[6] NRHA then filed its Petition for Certiorari in this Court.[7]

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[6]Some expenses were incurred with respect to lines in streets that were widened, and others in streets that were only partially closed. On remand, the district court was directed to determine whether these costs were covered by the Act.

[7]HUD, after entering a financial settlement with NRHA regarding the projects involved here, filed a petition opposing the grant of certiorari.

III. ARGUMENT

A. THIS COURT NEED NOT DECIDE WHETHER THE URA CHANGES THE TRADITIONAL COMMON LAW RULE REGARDING UTILITY RELOCATIONS BECAUSE THE COMMON LAW WOULD NOT APPLY IN THIS CASE EVEN ABSENT THE URA.

It is not disputed that the traditional common law rule requires a utility to relocate, at its own expense, its facilities located within public rights-of-way. *See New Orleans Gas Light Co.* v. *Drainage Commission of New Orleans*, 197 U.S. 453 (1905); *Potomac Electric Power Co.* v. *Fugate*, 211 Va. 745, 180 S.E.2d 657 (1971). The power to require utility relocation of its lines is based, ultimately, on the public nature of the streets in which the city holds a public easement; thus the utility's interest in the public way is subordinate to the public's enjoyment of it. *Port of New York Authority* v. *Hackensack Water Co.*, 195 A.2d 1,4 (N.J. 1963). By extension, then, if there is no public right-of-way over land in which the utility has placed its lines, there is no power in the public authority to require the utility to relocate solely at its own cost.[8]

In the present case, C&P did not move its facilities from a public right-of-way. The lines were moved from land which NRHA acquired in fee simple absolute, free from the public right-of-way which previously encumbered it. *Chesapeake & Potomac Telephone Company* v. *Landrieu*, 674 F.2d 298, 301 (4th Cir. 1982). When NRHA, like any other purchaser under Virginia law, acquired a parcel of land abutting a public right-of-way, it also acquired the underlying fee in that right-of-way extending out to its center line, but subject to the public easement for use and travel; when parcels across the street

[8] In some cases, even where there is a public right-of-way, the utility will not have to bear all relocation costs. For instance, in Baltimore v. Baltimore Gas & Electric Co., 232 Md. 123, 192 A.2d 87 (1963), the court held the traditional rule inapplicable where the relocation of facilities was necessitated by the municipality's exercise of a proprietary rather than a government function.

from each other were acquired, NRHA acquired the entire fee. 674 F.2d at 301. When these acquisitions were completed, NRHA filed petitions with the Norfolk City Council requesting that the affected streets be closed; once the street closing ordinances were adopted, the public easement for use and travel was extinguished. *Id.* Because C&P did not remove its lines until after the streets were closed to the public, it did not "remove its distribution facilities from public rights of way."[9]

Thus, the crucial element upon which the city's power under the common law to require relocation depends – the public right-of-way – was not present once the easement was extinguished. Consequently, the common law rule is inapplicable under the facts of this case, regardless of whether Congress "intended" that the URA change it.

B. ABSENT CLEAR LEGISLATIVE INTENT TO THE CONTRARY, A COURT MUST APPLY THE PLAIN LANGUAGE OF A STATUTE; HERE, C&P MEETS ALL STATUTORY REQUIREMENTS TO QUALIFY AS A "DISPLACED PERSON."

1. *There is no indication of an intent to exclude utilities from URA coverage.*

As the court of appeals below correctly noted, "in the absence of any *clear* legislative intent to exclude utilities, it is this court's duty to apply the literal language of the [URA]." 674 F.2d at 298 (emphasis added). While Petitioner cites other acts of Congress[10] in an attempt to show what the legislature

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[9] *See* Respondent's Brief in Opposition to Certiorari at 5. A.G.A. supports C&P's contention that Petitioner has misstated the question presented for this reason.

[10] Specifically, the Federal-Aid Highway Act of 1956, 23 U.S.C. §123 (1976), as amended, and the District of Columbia Public Utilities Reimbursement Act of 1972 (DCPURA), Pub. L. No. 92-495, 86 Stat. 812 (1972). The Highway Act allows reimbursement for relocations resulting from interstate highway construction and the DCPURA allows reimbursement in the District of Columbia without regard to federal financial participation and regardless of whether there has been an "acquisition."

did not intend when enacting the URA, this effort is unconvincing. Even in the best of circumstances, it is difficult to ascertain congressional "intent" when confronted with statutory interpretation. Reliance on the provisions and legislative history of other acts dealing with different subject-matter adds nothing to the determination at issue here, particularly when one can cite the same provisions and history and arrive at precisely the opposite conclusions.[11]

The purpose of the URA as stated in its Declaration of Policy, is to

> establish a uniform policy for the fair and equitable treatment of persons displaced as a result of Federal and Federally assisted programs in order that such persons shall not suffer disproportionate injuries as a result of programs designed for the benefit of the public as a whole.

42 U.S.C. §4621. Petitioner has not produced any legislative history that *specifically* indicates a congressional intent to exclude utilities from the provisions of the URA. Given its stated purpose and the lack of evidence to the contrary, Congress' failure to mention utilities "provides little reason to exclude [them] from the Acts coverage." 674 F.2d at 300.

2. ***C&P moved its personal property as a result of the NRHA acquisition.***

The URA defines "displaced person" as any person

> who moves from real property, as a result of the acquisition of such real property, in whole or in part . . . for a program or project undertaken by a Federal agency, or with Federal financial assistance; . . .

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[11] Indeed, as HUD noted with regard to the DCPURA, these Acts indicate that Congress wanted utilities to be reimbursed. *See* HUD Brief in Opposition to Certiorari at 6 n.3.

42 U.S.C. §4601(6). The term "person" means individuals, partnerships, corporations or associations. 42 U.S.C. §4601(5).

Petitioner claims that C&P does not qualify under this definition. Specifically, NRHA contends, first, that the facilities involved in this relocation are real rather than personal property, and, second, that C&P did not move "as a result of the acquisition of land."[12] It is our position that NRHA is wrong on both points.

HUD regulations require that to determine what qualifies as personal property, one must refer to the law of the state in which the property is located.[13] NRHA relies on *Transcontinental Gas Pipe Line Co.* v. *Prince William County*, 210 Va. 55, 172 S.E.2d 757 (1970) for the proposition that utility lines are realty, rather than personalty. Reliance on this case, however, is misplaced.

The court in *Transco* relied on the general rule that the intention of the party is the chief test to be considered in determining whether a chattel has been converted to a fixture and thus a part of the realty. 210 Va. at 55. Other considerations are annexation of the property to the realty, and adaptation to the use or purpose to which that part of the realty with which the property is connected is appropriated.[14] 210 Va. at 555. Intent, however, is paramount and controlling. *Danville Holding Corp.* v. *Clement*, 178 Va. 223, 232, 16 S.E.2d 345, 349 (1941).

In *Transco*, the company had installed gas pipelines in land in which it had acquired permanent rights-of-way and a

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[12] Brief of Petitioner at 32-39.

[13] 24 C.F.R. §42.40(m)(2).

[14] Clearly in this case C&P annexed its lines and conduits to the realty. Contrary to NRHA's contention, however, *see* Brief of Petitioner at 33, the lines were not adapted to the use or purpose of the land to which they were attached; the presence of utility lines neither contributes to nor detracts from the use or purpose of a street. *See* Bangor-Hydro Electric v. Johnson, 226 A.2d 371, 377 (Me. 1967) (utility poles within limits of public highway establish no adaptation to use of highway and neither contribute to its purpose nor bring about joinder with highway in common enterprise).

perpetual easement from the fee simple owners. 210 Va. at 552. This property interest in the land was crucial to the court's determination that the lines were real rather than personal property, as evidenced by its citing *City of Newport News* v. *Warwick County*, 159 Va. 571, 166 S.E. 570 (1932) as controlling. The *Newport News* court held that where a city owned and operated a system of waterworks in a county, the mains located beneath public highways *in which the city held easements*, constituted fixtures upon the land. 159 Va. at 601-03, 166 S.E. at 581. Thus, where there is a real property interest held by the owner of the lines, it is more likely that the owner intended that the lines become part of that realty. Here, C&P holds no real property interest or easement in the streets in which it maintains its lines. Consequently, it could hardly have extended them to be so affixed as to become the property of others who actually owned the land.[15]

Further, the intent to make a chattel a permanent annexation to realty most affirmatively and plainly appear in order to convert it into a fixture; if the matter is left in doubt and uncertain, the legal qualities of the article are not changed, and it must be deemed a chattel. *Mullins* v. *Sturgill*, 192 Va. 653, 66 S.E.2d 483 (1951). Under these circumstances, then, it cannot be said that C&P "affirmatively and plainly" intended its lines to become fixtures. Otherwise, C&P would have no right to remove them.

NRHA also contends that C&P did not remove its lines "as a result of the acquisition of such real property," as required by the Act, *see* 42 U.S.C. §4601(6), but that it moved its facilities because of the requirements of the franchise. Petitioner's arguments on this point are unpersuasive.

It is undisputed that NRHA acquired the land from which C&P moved. The acquisition was in furtherance of a federally-

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[15] *See also* United Electric Light v. Deliso Const. Co., 52 N.E.2d 553, 556 (Mass. 1943) (utility equipment installed in *public* way under permits granted by city did not become part of realty, but was company's personal property, which remained in its custody and possession) (emphasis added).

assisted project, and *but for* the acquisition of the land under the streets, C&P would not have had to relocate.[16] This is clearly a relocation as a result of an acquisition, and whether C&P moved pursuant to its franchise is irrelevant under the language of the statute. The closing of streets was done by the city at NRHA's request, and these closings would not have been necessary had it not been for the urban renewal project.

CONCLUSION

The claims for which C&P seeks reimbursement are within the purview of the URA. We stress again the limited nature of the relief provided for utilities under that act, and wish to dispel fears that a ruling in C&P's favor will adversely affect state and municipal programs receiving federal assistance.

The court below proceeded in accordance with established rules of statutory construction and its ruling is equitable and within the plain language and purpose of the URA. The decision of the court of appeals should be affirmed.

Respectfully submitted,

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[16] The same reasoning would apply to tenants and owners of buildings on the land acquired by NRHA. Their relocation is the result of the acquisition. To use a different standard for utilities similarly affected would not comport with the purpose of the URA, which is to provide for the "*fair and equitable* treatment of persons displaced" by such projects. 42 U.S.C. §4621 (emphasis added).

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In the
Supreme Court of the United States.

OCTOBER TERM, 1982.

NORFOLK REDEVELOPMENT AND HOUSING AUTHORITY, A POLITICAL SUBDIVISION OF THE COMMONWEALTH OF VIRGINIA,
PETITIONER-DEFENDANT,

v.

THE CHESAPEAKE AND POTOMAC TELEPHONE COMPANY OF VIRGINIA,
RESPONDENT-PLAINTIFF.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT.

Brief of the Boston Redevelopment Authority as Amicus Curiae in Support of Petitioner.

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TABLE OF CONTENTS

	PAGE
TABLE OF AUTHORITIES CITED.....	iii
INTEREST OF THE AMICUS CURIAE.....	1
SUMMARY OF ARGUMENT.....	9
ARGUMENT.....	11
I. THE STATUTORY PHRASE "DISPLACED PERSON" DOES NOT INCLUDE UTILITY COMPANIES THAT RELOCATE AT THE REQUEST OF STATE AUTHORITIES.....	11
A. Utility Companies Are Not Displaced Persons under the Uniform Relocation Act Because They Suffer No Taking.....	11
B. Utility Companies Are Not Displaced Persons Within the Meaning of the Uniform Relocation Act Because They Suffer No Disproportionate Injury.....	16
II. THE LEGISLATIVE HISTORY OF THE UNIFORM RELOCATION ACT SUPPORTS PETITIONER'S POSITION THAT RELOCATION BENEFITS WERE NOT INTENDED TO BE PAID TO UTILITIES.....	23

III. CONGRESSIONAL ACTION SINCE THE PASSAGE OF THE UNIFORM RELOCATION ACT SUPPORTS PETITIONER'S POSITION THAT UTILITIES ARE NOT ENTITLED TO RELOCATION BENEFITS.. 30

IV. CONSTITUTIONAL CONSTRAINTS REQUIRE REVERSAL OF THE FOURTH CIRCUIT'S HOLDING IN DEFERENCE TO ESTABLISHED STATE REGULATION OF UTILITY COMPANIES..... 32

A. The Fourth Circuit's Holding Contravenes the Tenth Amendment..... 34

B. The Fourth Circuit's Ruling Constitutes an Impermissible Infringement of Contractual Obligations..... 41

CONCLUSION..... 46

APPENDIX..... 48

TABLE OF AUTHORITIES CITED

Cases

PAGE

Allied Structural Steel Co. v. Spannaus, 438 U.S. 234 (1978)..... 42, 43

Artesian Water Co. v. State Department of Highways & Transportation, 330 A.2d 432 (Del. Sup. Ct. 1974), modified, 330 A.2d 441 (1974)..... 15, 29

Boston Electric Light Co. v. Boston Terminal Co., 184 Mass. 566, 69 N.E. 346 (1904)..... 3, 18

Chesapeake and Potomac Tel. Co. of Va. v. Landrieu, 674 F.2d 298 (4th Cir. 1982)..... 23

El Paso v. Simmons, 379 U.S. 497 (1965)..... 46

Equal Employment Opportunity Commission v. Wyoming, 51 U.S. Law Week 4219 (March 2, 1983)..... 34, 37

Estate of Ceppi v. Commissioner of Internal Revenue, Docket No. 82-1453 (1st Cir. Jan. 11, 1983)..... 39

Federal Energy Regulatory Commission v. Mississippi, 102 S. Ct. 2126 (1982)..... 34

Hodel v. Virginia Surface Mining & Reclamation Assoc., 452 U.S. 264 (1981)..... 34, 36

Lynch v. United States, 292 U.S. 571 (1934)..... 42

Milliken v. United States, 283 U.S. 15 (1931)..... 39, 40

Natick Gas Light Co. v. Natick, 175 Mass. 246, 56 N.E. 292 (1900)..... 15, 16

National League of Cities v. Usery, 426 U.S. 833 (1976)..... 34, 36, 38

New England Telephone & Telegraph Co. v. Boston Terminal Co., 182 Mass. 397, 65 N.E. 835 (1903)..... 3, 15, 18

Pennhurst State School & Hospital v. Halderman, 451 U.S. 1 (1981)..... 34, 35, 40

Steward Machine Co. v. Davis, 301 U.S. 548 (1937)..... 35, 36

United States v. Darusmont, 449 U.S. 292 (1981)..... 40

United States Trust Co. v. New Jersey, 431 U.S. 1 (1977)..... 41, 42

Untermyer v. Anderson, 276 U.S. 440 (1928)..... 39, 40

Statutes

D.C. Code Annotated §5-804 (1982)..... 30

Federal-Aid Highway Act of 1968, Pub. L. 90-495, 82 Stat. 815 (1968)... 24, 26

Federal-Aid Highway Act of 1958, Pub. L. No. 85-831, 72 Stat. 89 (1958)..... 28

Federal-Aid Highway Act of 1956, Pub. L. No. 84-627, 70 Stat 374..... 27

Housing & Urban Development Act of 1968, Pub. L. No. 90-448, 82 Stat. 476 (1968)..... 24

Mass. Gen. Laws Ann. ch. 121B, §1 (West Supp. 1981)..... 2

Mass. Gen. Laws Ann. ch. 121B, §4 (West Supp. 1981)..... 1, 2

Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, 42 U.S.C. §§4601 et seq. (1976)..... passim

23 U.S.C. §123 ..... 26, 27, 29

Other Authorities

115 Congressional Record 31372 (1969)..... 20

115 Congressional Record 31534 (1969)..... 13, 25

116 Congressional Record 40163 (1970)..... 20

Note, Displaced Persons and the Uniform Relocation Act: A Proposed Methodology for Awarding Benefits, 58 B.U.L. Rev. 596 (1978)..... 12, 13, 17

House Rep. Report No. 906, 92d Congress, 2d Session (1972)..... 19, 31

House Rep. Report No. 1656, 91st Congress, 2d Session (1970)..... 24, 30

HUD Urban Renewal Handbook (RHA 7209.1)..... 5, 26

Senate Rep. No. 488, 91st Cong., 1st Session (1969)..... 12, 25

Senate Rep. No. 1254, 92d Cong., 2d Session (1972)..... 31

Senate Rep. No. 1407, 85th Cong., nd Session (1958)..... 27, 28

Supreme Court Rule 36.4..... 1

Uniform Relocation Act of 1970: Hearings on S.1 and H.R. 14898 Before Comm. on Public Works of House of Reps., 91st Cong., 1st and 2d Sessions (1970)..... 21

Petitioner's Brief for Writ of Certiorari..... 3

Appendix..... 6

BRIEF OF THE BOSTON REDEVELOPMENT AUTHORITY AS AMICUS CURIAE

INTEREST OF THE AMICUS CURIAE

The Boston Redevelopment Authority ("BRA")[1] respectfully submits this brief as amicus curiae in support of the position of the Norfolk Redevelopment and Housing Authority ("NRHA") and in order to bring to the Court's attention the interests of the BRA and of the public. The Fourth Circuit's decision, if affirmed, will adversely affect redevelopment not only in the Commonwealth of Massachusetts but also throughout other parts of the United States.

The BRA is charged with responsibilities very similar to those of the NRHA and other

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1. The BRA is a "public body politic and corporate" of the Commonwealth of Massachusetts (the "Commonwealth"), Mass. Gen. Laws Ann. Ch. 121B, §4 (West Supp. 1981). This brief is submitted pursuant to Supreme Court Rule 36.4.

housing and redevelopment authorities.[2] Since the passage of the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, 42 U.S.C. §§4601 et seq. (1976) (the "Uniform Relocation Act"), the BRA has undertaken a number of significant urban renewal projects in conjunction with the United States Department of Housing and Urban Development ("HUD"). Those projects were undertaken and funded on the express understanding and long standing practice of HUD that participation in federal funding would not jeopardize state regulation of public utilities. Such regulation is in

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2. The BRA is responsible within the City of Boston for the acquisition, clearance and assembly of land and improvements within decadent, substandard and blighted open areas and for preventing the spread of blight and deterioration in such areas through the carrying out of urban renewal projects. Mass. Gen. Laws Ann. Ch. 121B, §§1 and 4 (West Supp. 1981).

part an outgrowth of a rule of common law more than a century old. This rule provides that in return for the right to install its facilities under public streets at no charge, a public utility most upon request of the City remove its facilities at its own expense. Boston Electric Light Co. v. Boston Terminal Co., 184 Mass. 566, 69 N.E. 346 (1904); New England Telephone & Telegraph Co. v. Boston Terminal Co., 182 Mass. 397, 65 N.E. 835 (1903). This rule has been further implemented by contracts with public utilities in the form of licenses granted by municipalities. These licenses by their terms require a utility to bear relocation costs. In the case sub judice, the franchise agreement provided that the public utility "was obligated, upon request of the City, to abandon or remove ... [distribution facilities] without charge." Petitioner's Brief for Writ of Certiorari at 7. And, to the

extent a utility receives compensation for this basic responsibility, it does so through the rate structure established by state regulatory commissions[3] such as in Massachusetts the Department of Public Utilities.

In short, regulation of public utility rates has always been a matter of state concern; it has been HUD's long standing policy not to interpret the Uniform Relocation Act ("URA") so as to trench upon this basic state prerogative. Thus, HUD rejected C & P's claim based upon the purpose

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3. In the instant case, this was stipulated to below. Stipulation 11 states:

> "When in the course of its normal business practices C & P has relocated its facilities from the right-of-way of public streets upon the direction of the City of Norfolk, the cost of such relocation like any other expense has been borne by C & P as part of its operating expenses within the rate structure of the State Corporation Commission."

of the Uniform Relocation Act and HUD's stated policy (Emphasis added):

> The persons ... presently defined as displaced persons in HUD programs did not include the conduits, lines, etc., of utility companies. The HUD Urban Renewal Handbook, RHA 7209.1, chapter 2, p. 4, stated:
>
> > Removal or relocation of utility lines owned by a private utility company will not be allowed as a project expenditure unless compensation to the company is required under applicable State statutes, judicial decisions, or pre-existing local ordinances or provisions of the company's franchise.

In reliance upon this well established rule, the BRA embarked upon numerous federally assisted projects, budgeted such projects so as to exclude such relocation costs, and consummated financial settlements on those projects with HUD. Under the BRA's typical federal assistance "loan and grant" contract with HUD, relocation costs are to be reimbursed by HUD. However, HUD's obligation

to reimburse such costs is generally terminated by the final settlement agreement for each project.[4]

Approximately twenty final settlements have been made in connection with BRA projects. In each of these projects, no relocation costs were paid to public utilities and no funds were reserved for such expenses. If the Fourth Circuit's ruling is affirmed, utilities will now request reimbursement for relocation costs on these projects and others throughout the United

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4. Attached as an appendix to this brief is the text of a typical financial settlement or "close out" agreement. Paragraph D thereof provides:

> Any costs or obligations incurred in connection with the project with respect to claims which are disputed, contingent, unliquidated or unidentified and for the payment of which insufficient project funds have been reserved by the financial settlement, shall be borne by the City.

States even though such costs were incurred without expectation of compensation and have already been included in the utilities' rate base.[5]

The impact of such a result on the financial integrity of the BRA and on urban renewal is substantial. The practical effect is to create a large, unexpected windfall for public utilities. For redevelopment authorities, such as the BRA, such a result spells disaster. On projects for which financial settlements have been concluded, public utilities will look to the BRA for payment of relocation costs. The costs claimed by C & P

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5. As pointed out in the BRA's amicus brief in support of the NRHA's petition for a writ of certiorari, based upon the Fourth Circuit's decision, public utilities have refused to proceed with relocation of services for urban renewal projects unless paid relocation benefits.

in the case at bar were approximately $700,000. Using that figure as an approximation and multiplied twenty times, the BRA alone may face claims of fourteen million dollars. No funds have been appropriated to cover such unforeseeable claims. If such claims are in fact made, they will quickly exhaust existing funds and jeopardize the financialvitality of redevelopment authorities. Even if HUD pays such costs notwithstanding the financial settlements, it is obvious that there will be significantly less money available for urban revitalization, to the detriment of all.

The Fourth Circuit's decision shatters the bedrock of federalism. It abrogates local regulation that has, as a matter of common law, of contract and of state regulation, for over a century required public utilities to relocate without direct compensation. The ruling of the Fourth

Circuit comes without any precursor and, indeed, is contrary to HUD's long standing policy to exclude such costs from relocation benefits. It thus flies in the face of redevelopment authorities' reliance upon both state and federal law in entering into and closing out federally assisted projects. If the Fourth Circuit's decision is applied retroactively, basic constitutional tenets will be abridged. For these reasons, and in furtherance of the BRA's interest, the public interest, and the preservation of federalism, the BRA submits the arguments below.

SUMMARY OF ARGUMENT

The Uniform Relocation Act was enacted to provide supplemental benefits for displaced persons who had suffered a taking and were disproportionately injured thereby. Utility companies do not come within the ambit of the Act. As part of state regulation and as a matter of contract, utility

companies have agreed to relocate or abandon their distribution facilities at their own expense. There is therefore no compensable taking for their property. Utility companies also suffer no injury since they are merely complying with their contractual commitments and, in any event, have already been compensated in their rate base.

Legislative history shows that Congress enacted the Uniform Relocation Act with the federal highway and urban renewal programs in mind and with an intention to create a uniform system. Neither of these systems created a federal right to compensation for utility companies. Thus, Congress must not have intended to extend relocation compensation to utility companies under the Uniform Relocation Act.

Regulation of utility companies has been a traditional area of state regulation. The Uniform Relocation Act enacted a plan of

voluntary, not coercive, compliance to qualify for federal assistance. In reliance upon HUD's policy not to provide relocation benefits contrary to state regulation of utilities, state agencies entered into and settled federally assisted redevelopment projects. Absent a clear statement of Congressional intent to the contrary, it is improper to continue the Act as altering such established relationships without abridging the Tenth Amendment and the Contract Clause.

ARGUMENT

I. THE STATUTORY PHRASE "DISPLACED PERSON" DOES NOT INCLUDE UTILITY COMPANIES THAT RELOCATE AT THE REQUEST OF STATE AUTHORITIES.

A. Utility Companies Are Not Displaced Persons under the Uniform Relocation Act Because They Suffer No Taking.

The legislative history of the Uniform Relocation Act of 1970, 42 U.S.C. 4601 et seq. (1976), indicates that the Act was intended not to provide payments to all who

are inconvenienced by a redevelopment project, but rather primarily to provide supplemental benefits to those whose property is taken.[6] The Senate Report that accompanied the Uniform Relocation Act stated that the Act "is designed to permit the Federal government to deal consistently and fairly with all those whose property is taken for public projects...." Sen. Rep. No. 488; 91st Cong., 1st Sess. (1970). In discussing the

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6. Certain sections in the Uniform Relocation Act provide benefits when no taking has occurred. See, e.g., 42 U.S.C. §4624 (1976) (relocation benefits to tenants); 42 U.S.C. §4637 (1976) (persons displaced by certain housing projects considered displaced persons despite the absence of a taking). The fact that Congress felt compelled to deal specifically with these exceptions indicates that the general provisions of the Uniform Relocation Act provide benefits only where property is taken. See Note, Displaced Persons and the Uniform Relocation Act: A Proposed Methodology for Awarding Benefits, 58 B.U.L. Rev. 596, 619 n. 156 (1978).

the Uniform Relocation Act, Senator Mundt, one of its sponsors, stated:

> Our Constitution provides that when property is taken for a public purpose that owner will receive just compensation. However, when the fair price is paid for the property it does not provide for expenses that are incurred by the owner for being disrupted and in seeking a new location for his home or business. This bill would seek to compensate for these expenses....

115 Cong. Rec. 31534 (1969).

The Uniform Relocation Act therefore provides supplemental benefits to mitigate the hardship of traditional compensation under eminent domain under which an owner is compensated only for the value of the property taken. In light of its legislative history, one commentator has concluded that the statutory phrase, "displaced person", 42 U.S.C. §4601(6)(1976), should be interpreted so as to allow compensation only where there has been a taking. Note, Displaced Persons

and the Uniform Relocation Act: A Proposed Methodology for Awarding Benefits, 58 B.U.L. Rev. 596, 619 (1978) (hereinafter "Displaced Persons"). Thus, except for persons, such as tenants, for whom benefits are specifically provided by the Act, 42 U.S.C. §4624 (1976), it is a compensable taking which triggers the right to supplemental or relocation benefits. Since no property of a utility company is taken when its facilities are removed from under city streets, the utility does not fall within the statutory definition of displaced person.

A utility company, however, suffers no taking under the Uniform Relocation Act for two reasons. First, the government does not acquire a proprietary interest owned by the utility. Utility companies install their facilities under city streets subject to the above stated common law rule or pursuant to licensing agreements with municipalities.

The prevailing view in most jurisdictions is that the right granted by such licenses does not create a compensable property interest in the hands of the utility. Artesian Water Co. v. State, Department of Highways and Transportation, 330 A.2d 432, 440 (Sup. Ct. Del. 1974); New England Telephone & Telegraph Co. v. Boston Terminal Co., 182 Mass. 397, 399, 65 N.E. 835, 836 (1903). Thus, the utility has no compensable interest.

Second, although the actual facilities that are affected may qualify as personal property of the utility company, Natick Gas Light Co. v. Natick, 175 Mass. 246, 248, 56 N.E. 292, 293 (1900), it is clear that no property interest of a utility company in these facilities is appropriated by the government when the utility is requested to supply new distribution services. The facilities may "no longer [be] useful as originally placed. But [they remain] the

property of the [utility company]." Natick Gas Light Co. v. Natick, 175 Mass. at 248; 56 N.E. at 293.

Absent the acquisition of a property interest of a utility by the government, there is no right to supplemental benefits. By virtue of the consensual licensing arrangement in cases such as the one at bar, a utility can have no such interest.

B. Utility Companies Are Not Displaced Persons Within the Meaning of the Uniform Relocation Act Because They Suffer No Disproportionate Injury.

One of the policies of the Uniform Relocation Act is to compensate those who suffer disproportionate injuries as a result of government programs. The declaration of policy of the Uniform Relocation Act states:

> The purpose of this subchapter is to establish a uniform policy for the fair and equitable treatment of persons displaced as a result of Federal and federally assisted programs in order that such persons shall not suffer

> disproportionate injuries as a result of programs designed for the benefit of the public as a whole.

42 U.S.C. §4621 (1976) (emphasis added).

Again, the phrase "displaced person" should be interpreted in light of this policy, thereby excluding those who do not suffer disproportionate injury. See, Note, Displaced Persons, 58 B.U.L. Rev. at 622-25 (arguing that tenants who are forced to move by a government project at the expiration of their leases should not be entitled to relocation benefits because they suffer no disproportionate injury).

It is obvious that a utility company that relocates facilities installed under public streets suffers no injury, let alone one that is disproportionate. As is explained above, a utility company generally undertakes a contractual obligation to relocate at its own expense facilities

installed under public streets. This contractual obligation is merely a reflection of the common law rule that in return for the right to install facilities under public streets at no charge, a public utility may be required to remove its facilities at its own expense. Boston Electric Light Co. v. Boston Terminal Co., 184 Mass. 566, 69 N.E. 346 (1904); New England Telephone & Telegraph Co. v. Boston Terminal Co., 182 Mass. 397, 65 N.E. 835 (1903). Thus, a utility company cannot claim that relocation costs are a disproportionate injury because it voluntarily has undertaken such obligations.

Utilities that relocate as a result of federal programs do not suffer any real economic injury. Utilities are allowed to install facilities under public streets free of charge. The cost of providing the service and profiting therefrom is the quid pro quo for the free license. When relocation is

necessary, cities normally enter into new licensing arrangements giving utilities free access to land below public streets. Unlike tenants or homeowners who are forced to relocate, utilities do not face the possibility that a new location can be secured only at a higher cost. Moreover, any economic cost that may be incurred by a utility in relocation is normally passed on to the consumer in the form of higher rates. In amending the relocation statute for the District of Columbia, Congress gave explicit recognition to this situation. H.R. Rep. No. 906, 92d Cong., 2d Sess., at 2 (1972).

The fact that utilities suffer no disproportionate injury did not escape the attention of Congress. The original version of the Uniform Relocation Act passed by the Senate (S.1) explicitly excluded from the definition of "displaced persons" utilities that had a contractual obligation to bear the

costs of relocation of facilities located under public streets. Section 105(5) stated:

> Under this paragraph the term "displaced person" shall not include the owner of personal property on the premises of another under a lease or licensing arrangement where such owner is required pursuant to such lease or license to move such property at his own expense.

S.1, 91st Cong., 1st Sess. 105(5), 115 Cong. Rec. 31372 (1969). This is a clear Congessional statement that utility companies forced to relocate facilities under public streets do not suffer the type of disproportionate harm that would entitle them to relocation benefits.

The language that passed the Senate as Section 105(5) was dropped as part of a reorganization and amendment of the bill by the Committee on Public Works of the House of Representatives. See 116 Cong. Rec. 40163 (1970) (House passage of bill as amended). The deletion of Section 105(5), however, in

no way reflected a change in the Congressional position with regard to relocation benefits for utilities. The clearest statement of the reason for the change came in the hearings before the House Committee on Public Works:

> Section 105(5). The last sentence of this subsection beginning on Line 21, page 4, provides that the term "displaced person" does not include the owner of personal property on the premises of another where the owner is required by a lease or license to move such property at his own expense. It is not clear whether this sentence is applicable to all tenants or leasees or whether this sentence is intended to remove from the definition of displaced persons the "absentee" owner of personal property. Since the purpose of the relocation assistance law is to aid tenants as well as owners, a clarification of this sentence is necessary. For example, a literal interpretation of this provision would exclude owners of mobile homes in trailer parks under lease.
>
> This language may have been included in an attempt to make public utilities occupying right-of-way by permit ineligible for moving cost payments, but it really covers many other categories of

> owners also. Moreover, this language seems completely inconsistent with the provisions in lines 13 through 20 on page 33, and lines 15 through 22 on page 38 which provides specifically for paying leasees who own buildings even though the lease requires them to move the building at no expense. In view of this ambiguity we recommend deletion of the last sentence on page 4.

Uniform Relocation Act of 1970: Hearings on S.1 and H.R. 14898 Before Comm. on Public Works of House of Reps., 91st Cong., 1st and 2d Sess. 137-38, (1970) (Statement of the Legal Affairs Committee of the American Assoc. of State Highway Officials). Section 105(5) was eliminated by the House because it was too broad. This amendment in no sense repudiated the Senate's expressed recognition of the fact that a utility company does not suffer the type of disproportionate impact necessary to qualify as a "displaced person".

Thus, Congress recognized this economic trade-off, and did not provide for a utility to be deemed a displaced person under the

additional benefits expressly provided under §4624 to persons, such as occupants of dwelling units or storekeepers, who may not qualify as entitled to supplemental benefits because no property is taken but who nevertheless pay for the right to occupy and are commonly forced to relocate as a result of urban development projects. When interpreted in light of the policies of the Act, the phrase "displaced person" clearly excludes utility companies that have suffered no taking and have been impacted only to the extent of being forced to fulfill their contractual obligations.

II. THE LEGISLATIVE HISTORY OF THE UNIFORM RELOCATION ACT SUPPORTS PETITIONER'S POSITION THAT RELOCATION BENEFITS WERE NOT INTENDED TO BE PAID TO UTILITIES.

The Court of Appeals placed great weight on the "absence of any clear legislative intent to exclude utilities", 674 F.2d at 301, and relied in addition on Congress' failure to mention utilities and on its

purported intent "to extend benefits uniformly to persons who are displaced by federal acquisitions." Id. To the contrary, however, the legislative history of and policy underlying the Uniform Relocation Act indicate that utilities were not intended to receive relocation benefits under the Act.

The legislative history of the Act demonstrates that Congress intended to extend a system of relocation assistance then being used under the Federal-Aid Highway Act of 1968, Pub. L. No. 90-495, §30, 82 Stat. 815, 830-834 (1968) (repealed 1971) and under the Housing and Urban Development Act of 1968, Pub. L. No. 90-448, 82 Stat. 476, 526 (1968) (repealed 1971) to all other federal agencies. For example, in passing the Uniform Relocation Act, Congress expressly recognized the Federal-Aid Highway Act of 1968 as a "major precedent". H.R. Rep. No. 1656, 91st Cong., 2d Sess. 2, reprinted in

[1970] U.S. Code Cong. & Ad. News 5850, 5851. In addition the Senate Report on the Uniform Relocation Act stated: "It follows as closely as possible the substantive policies of the Housing and Urban Development Act and the Federal-Aid Highway Act...." S. Rep. No. 488, 91st Cong., 1st Sess., page 2 (1969). Finally, Senator Muskie, the sponsor of the bill which became the Uniform Relocation Act, stated on the Senate floor:

> The problems created by the impact of such acquisitions have long been one of the Nation's top domestic burdens.... Much of this problem will be covered by the present relocation and acquisition programs of HUD and the new programs authorized under the Highway Act of 1968. Yet, many other agencies and programs still lack consistency as well as identity with requirements of these programs.

115 Cong. Rec. 31534 (1969). Senator Mundt added the following remarks:

> The effort to provide additional compensation was recognized by Congress when it

> approved the urban renewal legislation and more recently in the Highway Act of 1968. Our bill seeks to carry the benefit of these two statutes to all Federal and federally assisted land acquisition to provide uniformity of policy so badly needed in this area.

115 Cong. Rec. 31534. (1969).

Thus, Congress modeled the Uniform Relocation Act on the programs of relocation benefits being used on federal highway projects and HUD projects as of 1970. Significantly, neither of these programs provided relocation benefits for utilities. HUD policies unequivocally denied relocation benefits to utilities except where required by state law or other applicable contractual or legal requirements. See, HUD Urban Renewal Handbook (RHA 7209.1), supra. Similarly, the benefit program under the Federal-Aid Highway Act of 1968 did not require relocation compensation but rather allowed for reimbursement only where mandated by state laws. 23 U.S.C. §123 (1976).

Indeed, the legislative history of 23 U.S.C. §123 provides a clear indication that the program of relocation benefits under the Federal-Aid Highway Act did not grant benefits to utilities. Section 123 was originally Section 111 of the Federal-Aid Highway Act of 1956, Pub. L. No. 84-627, 70 Stat. 374, 383. Under this provision the federal government was authorized to reimburse states for 95 percent of the utility relocation costs paid by states. In response to this provision many states enacted legislation allowing the payment of relocation benefits under state law to utilities where reimbursement from the federal government was available. S. Rep. No. 1407, 85th Cong., 2d Sess., reprinted in [1958] U.S. Code Cong. and Admin. News 2383-84.

In response to this abuse, Congress amended the Federal-Aid Highways Act to make the provision of relocation benefits to

utilities by states less attractive. Federal Aid Highway Act of 1958, Pub. L. No. 85-831, 72 Stat. 89 (1958). Specifically the federal reimbursement of such costs was limited to seventy percent and such reimbursement was made available only when the state presented evidence that such relocation costs had been paid out of its own funds. S. Rep. No. 1407, 85th Cong. 2d Sess., reprinted in [1958] U.S. Code Cong. and Admin. News at 2383.

In justifying these 1958 amendments, the Senate Report stated:

> The committee did not contemplate this drastic change in existing practice when the 1956 act was enacted, and realizes that the use of Federal funds for reimbursement to the States for this purpose will increase substantially, thereby reducing the amount of Federal funds available for construction of highways.

Id. at 2382-83. Thus, Congress was clearly aware of the problems created by providing relocation benefits to utilities and sought to avoid these problems under the Federal-Aid

Highway Act by limiting the availability of such benefits to utilities.

Moreover, the Federal-Aid Highway Act utilities relocation provision, 23 U.S.C. §123, was not repealed by the Uniform Relocation Act. 84 Stat 1903 (1971); Artesian Water Co. v. State, Dept. of Highways & Trans., 330 A.2d 432 (Del. Sup. Ct. 1974), modified, 330 A.2d 441 (1974). Thus, section 123 remains as a viable statement of Congressional hostility to the payment of relocation benefits to utilities. It seems unlikely that Congress would, sub silentio, adopt a completely different policy under the Uniform Relocation Act. This is particularly true in light of the fact that one of the stated purposes of the Uniform Relocation Act was the achievement of a uniform policy for relocation assistance and real property acquisition. H.R. Rep. No.

1656, 91st Cong., 2d Sess., 3, reprinted in, [1970] U.S. Code Cong. & Ad. News 5850, 5851.

In summary, Congress enacted the Uniform Relocation Act with two systems of relocation benefits in mind. Neither of these systems created a right to compensation under federal law for utility companies. Thus, the only reasonable conclusion from the legislative history is that Congress did not intend to extend relocation compensation to utility companies by enacting the Uniform Relocation Act.

III. CONGRESSIONAL ACTION SINCE THE PASSAGE OF THE UNIFORM RELOCATION ACT SUPPORTS PETITIONER'S POSITION THAT UTILITIES ARE NOT ENTITLED TO RELOCATION BENEFITS.

In 1972 Congress amended the relocation provisions of the District of Columbia Code to provide relocation benefits to utility companies. Act of Oct. 14, 1972, Pub. L. 92-495 §2, 86 Stat. 812 (presently codified D.C. Code Ann. §5-804 (1982)). In justifying the amendment the House Report stated:

> As indicated, customers of these utilities are currently bearing these extraordinary [relocation] costs ... through the rates they pay for their utility services, despite the fact that these projects benefit the entire metropolitan community ....

H.R. Rep. No. 906, 92d Cong., 2d Sess. (1972); see, also, S. Rep. No. 1254, 92d Cong., 2d Sess. (1972). Such a justification is inconsistent with the proposition that utility companies are entitled to relocation benefits under the Uniform Relocation Act. Indeed, if utilities are entitled to relocation benefits under the Uniform Relocation Act, the District of Columbia relocation provision would largely be surplusage. Congressional action subsequent to the passage of the Uniform Relocation Act thus indicates that utilities were not intended to receive benefits under the Act.

IV. CONSTITUTIONAL CONSTRAINTS REQUIRE REVERSAL OF THE FOURTH CIRCUIT'S HOLDING IN DEFERENCE TO ESTABLISHED STATE REGULATION OF UTILITY COMPANIES.

It is clear from the language of the Uniform Relocation Act that Congress did not intend to preempt traditional areas of state sovereignty. Rather, the Act envisions voluntary compliance in that no federal assistance grants are to be approved unless the state agency provides satisfactory assurances that "fair and reasonable relocation payments shall be provided to or for displaced persons as are required to be provided by a Federal agency under sections 4622, 4623 and 4624 of this title." 42 U.S.C. §4630(1). See, 42 U.S.C. §4631, establishing the basis for federal participation in such relocation costs.

Since the passage of the Uniform Relocation Act, it has been the announced policy of HUD not to require state

authorities to forego their traditional regulatory prerogatives over utilities. Based upon this policy, states have participated in and settled federally assisted redevelopment projects. The Fourth Circuit's decision, however, brings the Uniform Relocation Act into direct conflict with contrary state contractual and regulatory policy. This is particularly true on settled projects where the state agency, such as the BRA, now must bear the brunt of unanticipated relocation costs contrary to the state policy. The effect of the Fourth Circuit's decision is to transform the Uniform Relocation Act into an instrument of federal coercion by judicial fiat and without a clear mandate from Congress that any such result was intended. Such interpretation

runs afoul of the Tenth Amendment[7] and the Contract Clause.

A. The Fourth Circuit's Holding Contravenes the Tenth Amendment.

The problems of preserving state sovereignty under the Tenth Amendment have recently been addressed by this Court in its decisions in National League of Cities v. Usery, 426 U.S. 833 (1976); Pennhurst State School & Hospital v. Halderman, 451 U.S. 1 (1981); Hodel v. Virginia Surface Mining and Reclamation Assoc., 452 U.S. 264 (1981); Federal Energy Regulatory Commission v. Mississippi, 102 S. Ct. 2126 (1982); and Equal Employment Opportunity Commission v.

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7. The Tenth Amendment provides that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

Wyoming, 51 U.S. Law Week 4219 (March 2, 1983).

In Pennhurst, the Court summarized the existing law in these terms:

> [L]egislation enacted pursuant to the Spending Power is much in the nature of contract: in return for federal funds, the States agree to comply with federally imposed conditions. The legitimacy of Congress' power to legislate under the spending power thus rests on whether the State voluntarily and knowingly accepts the terms of the "contract." See Steward Machine Co. v. Davis, 301 U.S. 548, 585-598 (1937); Harris v. McRae, 448 U.S. 297 (1980). There can, of course, be no knowing acceptance if a State is unaware of the conditions or is unable to ascertain what is expected of it. Accordingly, if Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously. By insisting that Congress speak with a clear voice, we enable the States to exercise their choice knowingly, cognizant of the consequences of their participation.

451 U.S. at 17 (citations omitted).

As in Pennhurst, there is nothing in the Act or its legislative history to suggest that Congress intended to reverse traditional

state relationships with public utilities concerning payment of relocation costs. It is only after the choice has been made by the states that this possibility emerges because of the Fourth Circuit's decision. The Fourth Circuit incorrectly presumed that the absence of a clear exclusion by Congress meant that utilities should be included. In so holding, it was misapplying the applicable standard in light of the well-established contrary state policy. Such an interpretation transgresses the line drawn by this Court between inducement and impermissible coercion which has always limited the power of Congress to impose conditions on the states by exercise of the Spending Power. Steward Machine Co. v. Davis, 301 U.S. 548, 591 (1937).[8] If

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8. National League of Cities and Hodel also speak to this situation although they addressed direct Congressional enactments under the Commerce Clause.

Congress had intended to abridge the power of the states, it had to do so clearly, not sub silentio. Without explicit Congressional

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(Footnote 8 Cont.)

> The test enunciated therein is summarized in Chief Justice Burger's dissenting opinion in Equal Employment Opportunity Commission v. Wyoming, supra:
>
> > First there must be a showing that the challenged regulation regulates the "States as States".... Second, the federal regulation must address matters that are indisputably "attributes of state sovereignty".... And, third, it must be apparent that the States' compliance with the federal law would directly impair their ability "to structure integral operations in areas of traditional functions."
>
> Id. at 4226 (citations omitted).
>
> Here, the requirement imposed, reimbursement of utility relocation costs, is a direct imposition on the States as States; the local redevelopment authorities themselves will be responsible for these costs. Because the action abrogates the States' ability to enforce their common law rights and

direction, the Court should refrain from imposing upon the states a retroactive and unknowing waiver of important contractual right.

Analogous to the case at bar are cases in the field of tax law, which have held tax obligations imposed retroactively to be an impermissible form of retroactive

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(Footnote 8 Cont.)

> to regulate their local utilities, it interferes with the States' sovereignty. In doing so, it impairs the power of state utility commissions to discharge their traditional functions: first, because state redevelopment authorities, if forced to make such relocation payments without federal reimbursement, will be threatened with bankruptcy; and second, because these agencies will no longer by able to rely on the continued validity of their contractual arrangements. Because the Fourth Circuit's reading of the HUD regulations so violates the limits National League of Cities found in the Tenth Amendment, it must be struck down.

legislation. The line drawn by this Court between permissible and impermissible tax modifications appears to be that Congress can make a statute creating a totally new type of tax effective only after the date of enactment, whereas a statute modifying an existing tax can be effective back to the date on which serious debate began concerning such modification. Estate of Ceppi v. Commissioner of Internal Revenue, Docket No. 82-1453 (1st Cir. Jan. 11, 1983). Three decisions of this Court establish this principle.

In Untermyer v. Anderson, 276 U.S. 440 (1928), this Court held that the retroactive application of a statute enacting a novel inter vivos gift tax violated due process. In Milliken v. United States, 283 U.S. 15, 21 (1931), the Court noted that the reason for the constitutional infirmity of the statute in Untermyer was that "the nature and amount

of the tax burden imposed could not have been understood and foreseen by the taxpayer at the time of the particular voluntary act which was made the occasion of the tax." The situation in Milliken was held to be different because there there was no question that the transaction would be taxed, the only question was whether a newly imposed higher tax rate would apply. Finally, in United States v. Darusmont, 449 U.S. 292 (1981), the Court held that an amendment to the so-called minimum tax provisions could be made retroactive to the beginning of the year of enactment. The Court noted that this was not a situation where the taxpayer had no idea that the transaction would be taxed at all. 449 U.S. at 300.

The Fourth Circuit's holding clearly falls under the rules of Pennhurst and Untermeyer since it reverses legal relationships that had existed for over one hundred

years. Its retroactive effect violates basic due process concerns and infringes upon prerogatives reserved for the states by the Tenth Amendment.

B. The Fourth Circuit's Ruling Constitutes an Impermissible Infringement of Contractual Obligations.

As interpreted by the Fourth Circuit, the Uniform Relocation Act constitutes an impermissible interference by the federal government with the contractual rights between utility companies and municipalities in which they operate[9] and between those

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9. The fact that in some cases the relationship between utilities and municipalities with respect to easements under public property is defined by statute or ordinance rather than a written contract does not remove those relationships from the protection of the Contract Clause because a statute is itself treated as a contract when the language and circumstances evince a legislative intent to create private rights of a contractual nature. United States Trust Co. v. New Jersey, 431 U.S. 1, 17 n. 14 (1977).

municipalities, as recipients of HUD grants, and the federal government.

Although the Contract Clause by its express terms applies only to the states, this Court in a number of decisions has held that the substance of the clause applies to the federal government through the due process provisions of the Fifth Amendment.[10] Lynch v. United States, 292 U.S. 571 (1934). The continuing vitality of the Contract Clause as an effective protection against governmental impairment of private rights is seen in this Court's recent decisions in Allied Structural Steel Co. v. Spannaus, 438 U.S. 234 (1978), and United States Trust Co. v. New Jersey, 431 U.S. 1 (1977).

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10. Contract rights are also subject to the Fifth Amendment's prohibition against the taking of private property for public purpose without just compensation. Cf. United States Trust Co. v. New Jersey, 431 U.S. 1, 19 n. 16 (1977).

The Spannaus case is particularly germane to the present situation. There, as here, the government retroactively sought to impose contractual liability on a private party. There the State of Minnesota retroactively required certain employers to give vested pension rights for past service where the terms of employment under which services had been rendered had not included such rights. Quite similarly here, the Act as interpreted by the Fourth Circuit would require municipalities to pay relocation costs that they were not required to pay at common law and under their contracts with utilities, and that in fact had been expressly assumed by the utilities.

In Spannaus, this Court held that such legislation was in violation of the contract clause and, therefore, unconstitutional. The Court noted that the act in question there "substantially altered" the employment

relationship "by superimposing pension obligations upon the company conspicuously beyond those that it had voluntarily agreed to undertake," 438 U.S. at 240, thereby frustrating the employer's past reliance upon its funding plan to insure the adequacy of its pension fund. By contrast, the Court noted there had been no reliance by the employees upon the benefits conferred by the statute because the statute had not existed when the services had been rendered. 438 U.S. at 246-47 and n. 18. Finally, the Court noted that the statute imposed a substantial and completely unexpected liability upon the employer.

In Spannaus, this Court concluded that the statute was impermissible under the Contract Clause. The situation here is very similar. As in Spannaus, the Act imposes substantial liabilities that either were not imposed by contract or were specifically

excluded by contract. Municipalities and redevelopment authorities have relied on these contracts in funding their projects. Conversely, the only possible reliance by the utilities could have been on the common law, franchises, and contracts, all of which excluded reimbursement for relocation expenses. Finally, as in Spannaus, the obligation imposed by the Act is both unexpected and potentially fatal, especially in this period of local tax limitations and reduced federal grants.

The Fourth Circuit's holding also fails to fall within any of the situations recognized in Spannaus as obviating the absoluteness of the prohibition imposed by the Contract Clause. Most significantly, it does not protect a basic societal interest, but rather a favored group. It does not address any specific emergency situation. And, even assuming there is an emergency, the Act is

not limited to the duration of the emergency. This is not a situation as in El Paso v. Simmons, 379 U.S. 497 (1965), where the impairment is only to peripheral aspects of the contract. The municipality's right to have utility lines relocated at no expense is the principal consideration it receives for its permitting utilities to lay their electric lines under public ways without payment for an easement. The Fourth Circuit therefore wrongfully decided the case below because its holding violates the constitutional mandates of the Contract Clause.

CONCLUSION

For all of the foregoing reasons, the decision of the Fourth Circuit should be reversed or, if affirmed, applied only to

grants made after the date of this Court's decision.

Respectfully submitted,

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Dated: April 2, 1983.

APPENDIX

FINANCIAL SETTLEMENT AGREEMENT

THIS AGREEMENT entered into by and between Boston Redevelopment Authority (hereinafter referred to as the "LPA"), the City of Boston (hereinafter referred to as the "City"), and the Department of Housing and Urban Development (hereinafter referred to as "HUD"), acting through the Secretary or her duly authorized agent.

WITNESSETH

WHEREAS, the LPA has entered into a Loan and Grant Contract with HUD for the undertaking of an urban renewal project, pursuant to the provisions of Title I of the Housing Act of 1949, as amended, such project identified as Project No. Mass. R-129 (hereinafter called the "Project"); and the City has entered into a Cooperation Agreement with the LPA for making available financial and other assistance for the project; and

WHEREAS, the LPA has with the concurrance of the City submitted an application for financial settlement of the Project which will result in full repayment of all temporary loans pursuant to Section 112(b) of the Housing and Community Development Act of 1974 (P. L. 93-383) and the provisions of 24 CFR Part 570, Subpart I, and such settlement under the terms of this Agreement has been approved by resolution of the governing body of the City on August 9, 1978, and

WHEREAS, the LPA has submitted a Certificate of Completion and of Gross and Net Project Cost (HUD Form 6204 and attachment) for the Project, a copy of which is attached hereto; and

WHEREAS, the LPA has submitted certification that any environmental review required by 24 CFR Section 58.20 has been completed, and that the citizen participation

requirements under 24 CFR Section 570.303 (a)(2) have been complied with; and

WHEREAS, with respect to the Project all approved project activities for which project funds are available, or noncash local grants-in-aid which would otherwise have been required, will not have been substantially completed prior to the date of the financial settlement, and such settlement will result in the use of unearned grants for the repayment of temporary loans; and

WHEREAS, the LPA, City and HUD, the parties hereto recognize and acknowledge that the requirements with respect to certain remaining obligations as herein set forth are a condition to the approval by HUD of the financial settlement;

NOW, THEREFORE, in consideration of the mutual covenants, promises, and representation contained herein, the parties hereto agree as follows:

A. The following parcels of property acquired with Project funds remain undisposed. The net proceeds from the disposition of such property after financial settlement shall be treated as program income of the City under the provisions of 24 CFR 570.506.

Parcel	Estimated Proceeds
C-1	$ 1,700
O-1	0
O-2	450
O-3	300
O-5	0
O-6	0
O-7	0
P-1A	145,000
P-1B	150,000
P-1C	240,000
P-2A	30,000
P-2B	100,000
P-3A	4,000
P-5	550
R-14	9,000
R-17	10,400
RO-1	250
RW-1	21,000
RW-2	5,000

B. The parcels referred to in (A) shall be retained for disposition by the LPA subject to the covenants specified in Section

570.801(c)(1)(i), (ii), (iii), and (iv). In the dispostion of such land, the provisions of Section 110(c)(4) of Title I of the Housing Act of 1949, as amended regarding fair use value shall not apply.

C. On displacement from any properties listed in A and B above, the displacees shall be provided with all of the benefits to which they may be entitled under the Uniform Relocation Assistance and Real Property Act of 1970. Prior to such displacement the maintenance of occupied residential properties listed above shall be substantially consistent with the property management standards which were applicable to such property prior to the financial settlement.

D. Any costs or obligations incurred in connection with the project with respect to claims which are disputed, contingent, unliquidated or unidentified, and for the payment of which insufficient project funds

have been reserved under the financial settlement, shall be borne by the City. Unearned grant funds have been reserved for the following project obligations, remaining after financial settlement:

Legal Services	$ 22,500
Survey and Planning	3,250
Acquisition Expenses	14,600
Relocation Costs	319,500
Site Clearance	8,450
Site Improvements	768,314
Real Estate Purchases	971,625

E. Subject to the provisions of F, below, the surplus grant remaining after the financial settlement of the Project, including full repayment of the Project's temporary loan, shall be applied to the repayment of temporary loans in other City of Boston Urban Renewal Projects.

F. The availability of surplus grant funds under the provision of (E) above may, at the discretion of HUD, be subject to completion of an audit and satisfaction of any audit exceptions with respect to the

project, or any other projects located in the City. Neither such surplus grant funds or other funds available under the City's Community Development Block Grant Program shall be used for payment of ineligible Project costs.

G. Special conditions, the LPA and City shall comply with any special conditions required by the Secretary of Housing and Urban Development pursuant to the preliminary request submitted under 24 CFR, Section 570.303, to which the approval of the request for financial settlement shall be subject.

H. The obligations under this Closeout Agreement are subject to the Program Management requirements of 24 CFR Part 570, Subpart J.

I. The Project plan specifies the following parcels as sites for low and moderate income housing: R-1, R-2, R-3, R-4, R-5, R-6, and R-18. To date 338 units of low

and moderate income housing have been constructed on parcels R-1 through R-6. There are no current plans to provide housing on parcel R-18. However, on a continguous parcel a school is currently being converted to low and moderate income housing which was not envisioned in the original Project plan. In sum, the Project complies with the requirements of Section 105(f) of Title I of the Housing Act of 1949, as amended and if additional housing is provided in the Project it will also comply with this requirement.

J. If any provision of this Agreement is held invalid, such holding shall not affect the validity of the remainder of the Agreement.

IN WITNESS WHEREOF, the parties hereto have caused this Agreement to be executed and their seals to be hereunto affixed and

attested as of the 25th day of September, 1978.

(SEAL)

BOSTON REDEVELOPMENT AUTHORITY
LPA

ATTEST:

By _____
Acting Director

_____
Secretary

Approved as to form:

_____
Corporation Counsel

(SEAL)

CITY OF BOSTON

ATTEST:

By _____
Mayor

_____
City Clerk

CONCUR:
UNITED STATES OF AMERICA
SECRETARY OF HOUSING AND
URBAN DEVELOPMENT

By _____
DEPUTY AREA MANAGER

MOTION FILED
JUN 13 1983

No. 81-2332

IN THE
Supreme Court of the United States
OCTOBER TERM, 1982

NORFOLK REDEVELOPMENT AND HOUSING AUTHORITY,
a political subdivision of the Commonwealth of Virginia,
Petitioner,

v.

THE CHESAPEAKE AND POTOMAC TELEPHONE COMPANY
OF VIRGINIA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE ON BEHALF OF THE BROOKLYN UNION GAS COMPANY AND BRIEF AMICUS CURIAE

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Respondent.

**On Writ of Certiorari to the
United States Court of Appeals for the Fourth Circuit**

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

Pursuant to Rule 36.3, The Brooklyn Union Gas Company (Brooklyn Union) hereby respectfully moves for leave to file the attached brief as *amicus curiae* in this case. The consent of counsel for the respondent has been obtained. Counsel for the petitioner has objected.

I.

STATEMENT OF INTEREST

Brooklyn Union is a natural gas distribution utility which provides service to more than one-half of the City of New York. Approximately 4,000,000 people reside in Brooklyn Union's service area which encompasses all or part of the Boroughs of Brooklyn, Staten Island and Queens. Brooklyn Union's service area is comprised pre-

dominantly of low-middle-income and low-income residential customers who find it increasingly difficult to afford natural gas for cooking and residential heating purposes.

As a public utility operating under the laws of the State of New York, Brooklyn Union has a statutory obligation to provide natural gas to its customers at the lowest reasonable rates. *See* N.Y. Public Service Law § 65 (McKinney 1955 and Supp. 1982-83). As part of this public service obligation, Brooklyn Union has a duty to its ratepaying customers to take such steps as may be necessary to obtain reimbursement for the costs of forced relocation of its gas distribution facilities caused by the implementation of federally funded projects similar to that at issue in the present case. Unless utilities such as Brooklyn Union receive reimbursement for these costs, their only recourse is to recover them through an increase in the rates charged to their customers. Because the petitioner has challenged the decision of the Court of Appeals allowing recovery of utility relocation expenses under the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, 84 Stat. 1894, 42 U.S.C. §§ 4601-4655 (URA), Brooklyn Union and its customers may be adversely and directly affected by the outcome of this case.

II.

REASONS FOR GRANTING THE MOTION

The Court of Appeals held that a public utility is a "displaced person" under the URA and as such is entitled to reimbursement for the costs associated with the relocation of its distribution facilities necessitated by a federally funded urban renewal project. In so holding, the Court of Appeals recognized the broad intent of Congress to establish a uniform system of compensation for all persons displaced as a result of federally assisted projects designed to benefit the public as a whole. Reversal of the Court of Appeals' decision will have serious and far-reaching economic consequences for numerous public utilities and their customers. Unless the decision below is affirmed, utility customers will continue to bear a dispro-

portionate share of the costs of public projects from which they receive no special benefits.[1]

The respondent has consented to Brooklyn Union's filing of a brief *amicus curiae*. At this time, however, it is unclear whether the respondent can be expected to advance generally the interests of Brooklyn Union and other public utilities forced to incur relocation expenses under circumstances clearly contemplated by the URA but arguably beyond the scope of the Fourth Circuit's decision and the respondent's position in this case.[2] For this reason, Brooklyn Union has a unique and important perspective on this issue which should be useful to the Court's deliberations.

III.

CONCLUSION

For the reasons stated above, The Brooklyn Union Gas Company respectfully requests the Court to grant this motion so that Brooklyn Union may present its views in the attached brief.

Respectfully submitted,

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[1] Brooklyn Union competes with fuel oil companies whose customers receive the benefits of public works projects but are not burdened with the costs.

[2] *See* Brief In Opposition To Petition For Certiorari, filed by The Chesapeake And Potomac Telephone Company of Virginia herein, at 1-2.

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	vi
INTEREST OF AMICUS CURIAE	1
ARGUMENT	4
I. THE COURT OF APPEALS PROPERLY HELD THAT A PUBLIC UTILITY CAN QUALIFY AS A "DISPLACED PERSON" UNDER THE URA	4
II. THE URA ENTITLES PUBLIC UTILITIES TO COMPENSATION FOR RELOCATION EXPENSES CAUSED BY ACQUISITION OF REAL PROPERTY IN THE EXECUTION OF FEDERALLY ASSISTED PUBLIC WORKS PROJECTS	8
III. COMPELLING PUBLIC POLICY CONSIDERATIONS SUPPORT AFFIRMANCE OF THE DECISION BELOW	14
CONCLUSION	16

TABLE OF AUTHORITIES

CASES — Page

Alexander v. United States Department of Housing and Urban Development, 441 U.S. 39 (1979) .. 10
Bread Political Action Committee v. Federal Election Commission, 455 U.S. 577 (1982) 5
Chesapeake & Potomac Telephone Co. v. Landrieu, et al., 674 F.2d 298 (4th Cir. 1982), *cert. granted*, 51 U.S.L.W. 3526 (U.S. Jan. 17, 1983) 2
Commissioner v. Brown, 380 U.S. 563 (1965) 5
Consolidated Edison Co. of New York v. Lindsay, 24 N.Y.2d 309, 248 N.E.2d 150, 300 N.Y.S.2d 321 (1969) 6
Consumer Product Safety Commission v. GTE Sylvania, Inc., 447 U.S. 102 (1980) 5
In re Gillen Place, Borough of Brooklyn, 304 N.Y. 215, 106 N.E.2d 897 (1952) 6
New Rochelle Water Co. v. State of New York, 10 N.Y.2d 287, 177 N.E.2d 771, 220 N.Y.S.2d 809 (1961) 6
New York Telephone Co. v. City of Binghamton, 18 N.Y.2d 152, 219 N.E.2d 184, 272 N.Y.S.2d 359 (1966) 6
Trans Alaska Pipeline Rate Cases, 436 U.S. 631 (1978) 5
United States v. Clark, 454 U.S. 555 (1982) 5
United States v. Turkette, 452 U.S. 576 (1981) 5
United States v. 25.4 Acres of Land in Borough of Brooklyn, Kings County, 65 F. Supp. 333 (E.D. N.Y. 1946), *rev'd on other grounds sub nom. United States v. Brooklyn Union Gas Co.*, 168 F.2d 391 (2d Cir. 1948) 6
Whitman v. State Highway Commission of Missouri, 400 F. Supp. 1050 (W.D. Mo. 1975) 12

STATUTES

Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, 84 Stat. 1894, 42 U.S.C. §§ 4601-4655 ..... *passim*

TABLE OF AUTHORITIES—Continued

Page

N.Y. General City Law
§ 20-b (McKinney 1968 and Supp. 1982-83) 2
N.Y. Public Service Law
§ 65 (McKinney 1955 and Supp. 1982-83) 2

LEGISLATIVE HISTORY

116 *Cong. Rec.* 40,169 (1970) 7
116 *Cong. Rec.* 40,171 (1970) 15
House Comm. on Public Works, *Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970*, H.R. Rep. No. 1656, 91st Cong., 2d Sess., *reprinted in* 1970 U.S. Code Cong. & Ad. News 5850 ..... *passim*
Senate Comm. on Government Operations, *Uniform Relocation Assistance and Land Acquisition Policies Act of 1969*, S. Rep. No. 488, 91st Cong., 1st Sess. (1969) ..... *passim*
Uniform Relocation Assistance and Land Acquisition Policies Act of 1969: Hearings on S. 1 Before the Subcomm. on Intergovernmental Relations of the Senate Comm. on Government Operations, 91st Cong., 1st Sess. 2 (1969) 7

MISCELLANEOUS

58 Comp. Gen. 559 (1979) 12

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BRIEF AMICUS CURIAE OF THE BROOKLYN UNION GAS COMPANY IN SUPPORT OF RESPONDENT

INTEREST OF AMICUS CURIAE

The Brooklyn Union Gas Company (Brooklyn Union) is a natural gas distribution utility which provides service to more than one-half of the City of New York. Approximately 4,000,000 people reside in Brooklyn Union's service area which encompasses all or part of the Boroughs of Brooklyn, Staten Island and Queens. Brooklyn Union's customers are predominantly low-middle-income and low-income customers who use natural gas for home heating and cooking.[1] Due to substantial increases in the cost of

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[1] A study completed by Brooklyn Union's Corporate Planning Department in May 1983, based on 1980 United States census data, showed that the average income per household in Brooklyn Union's service territory in 1979 was approximately $17,300. That study

natural gas purchased at the wellhead, Brooklyn Union's residential rates have increased markedly in recent years. As a consequence, many of Brooklyn Union's customers find it increasingly difficult to afford natural gas for even the most fundamental and essential purposes.

As a public utility operating under the laws of the State of New York, Brooklyn Union has a statutory obligation to provide natural gas to its customers at the lowest reasonable rates. N.Y. Public Service Law § 65 (McKinney 1955 and Supp. 1982-83). If Brooklyn Union cannot obtain reimbursement for the costs associated with the relocation of its distribution facilities, these costs must be added to its rates and passed on to its customers. It is these customers who must bear the burden of increased rates brought about by the construction and installation of federally funded public works projects.[2] Even though in some cases the public works projects may provide Brooklyn Union's customers with no direct benefits, it is these customers who must pay a significant share of the costs. Brooklyn Union thus stands in the shoes of its many low-income customers who, if forced to pay relocation costs, will suffer increased hardship due to federally funded public works projects.

The Court of Appeals' decision[3] recognizes the intent of Congress under the Uniform Relocation Assistance

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also showed that 18.7% of the households served by the Company had an annual income of less than $5,000; 17.9% an income of $5,000 to $10,000; 15.9% an income of $10,000 to $15,000; 13.3% an income of $15,000 to $20,000; and 34.2% an income of over $20,000.

[2] Because gross receipts and sales taxes are imposed directly on gas sales to Brooklyn Union's customers, there is a "compounding" effect when rates to customers are increased to recover increased costs and expenses. N.Y. General City Law § 20-b (McKinney 1968 and Supp. 1982-83).

[3] *Chesapeake & Potomac Telephone Co. v. Landrieu, et al.*, 674 F.2d 298 (4th Cir. 1982), *cert. granted*, 51 U.S.L.W. 3526 (U.S. Jan. 17, 1983).

and Real Property Acquisition Policies Act of 1970, 84 Stat. 1894, 42 U.S.C. §§ 4601-4655 (URA), to compensate all persons displaced as a result of federally funded public works projects. Specifically, the Fourth Circuit held that a public utility is a "displaced person" under the URA and as such is entitled to compensation for the removal and replacement of its facilities where such relocation results from the acquisition of real property by a municipal agency in the execution of a federally funded urban renewal project.

Brooklyn Union supports the Court of Appeals' decision. Moreover, Brooklyn Union believes the URA provides utility relocation reimbursement for reasons not addressed by the Court of Appeals, but which clearly support respondent's position and which serve the manifest congressional purpose behind the URA. Congress intended the URA to apply with equal force to persons displaced either as a result of federally funded purchases of real property or as a result of the federally funded purchase of the right to use property in the execution of federally funded public works projects. Further, Title III of the URA also provides for alternative compensation to utilities forced to abandon or relocate their lines.

In seeking reversal of the Court of Appeals' decision, petitioner would have the Court adopt a narrow and unduly restrictive interpretation of the URA which would preclude recovery of relocation expenses by respondent or by any other public utility. Petitioner's position, if adopted by the Court, would eviscerate the URA as applied to utility customers across the country who presently shoulder a disproportionate share of the costs of federally funded public projects. Congress did not intend that result.

Accordingly, Brooklyn Union has a substantial interest in this case, will be adversely and directly affected if the decision of the Court of Appeals is reversed, and submits the present *amicus* brief in support of respondent.

ARGUMENT

I. THE COURT OF APPEALS PROPERLY HELD THAT A PUBLIC UTILITY CAN QUALIFY AS A "DISPLACED PERSON" UNDER THE URA

The URA was enacted in 1970 to provide a uniform system of compensation for those persons and businesses displaced by the relative proliferation of Federal and federally assisted public works projects. Congress recognized that traditional concepts of property valuation under state and Federal law were inconsistent and often inadequate to compensate displaced persons for the expenses encountered in relocating to new homes and places of business. *See, e.g.*, House Comm. On Public Works, *Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970*, H.R. Rep. No. 1656, 91st Cong., 2d Sess. 2 (1970), *reprinted in* 1970 U.S. Code Cong. & Ad. News 5850, 5850-51; Senate Comm. On Government Operations, *Uniform Relocation Assistance and Land Acquisition Policies Act of 1969*, S. Rep. No. 488, 91st Cong., 1st Sess. 1-2 (1969). To establish a consistent and comprehensive national compensation policy, Congress purposely used broad definitional language to encompass all manner of situations in which Federal projects directly cause the displacement of persons or property. *See* 42 U.S.C. § 4621 (1976). The Court of Appeals read the language of the URA in consonance with this broad congressional purpose and properly held that public utilities may qualify as "displaced persons" under the Act.

Under the provisions of the URA, "displaced persons" are entitled to recover from the Government the actual reasonable expenses incurred in moving personal property from real property as a result of the acquisition of such real property for a program or project undertaken by a Federal agency or with Federal assistance. 42 U.S.C. § 4622 (1976). The URA defines displaced persons as "any person" who either moves from real property or

moves personal property from real property as the result of the acquisition of such real property for federally funded projects. 42 U.S.C. § 4601(6). The Act defines "person" as "*any* individual, partnership, corporation, or association." 42 U.S.C. § 4601(5) (emphasis added). The Act does not exclude and its legislative history does not indicate a congressional intent to exclude public utility companies from the broad coverage of the URA.

As this Court has frequently recognized: "If the statutory language is unambiguous, in the absence of 'a clearly expressed legislative intent to the contrary, that language must ordinarily be regarded as conclusive.'" *United States v. Turkette*, 452 U.S. 576, 580 (1981) (quoting *Consumer Product Safety Commission v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980)). *See also Bread Political Action Committee v. Federal Election Commission*, 455 U.S. 577, 580-81 (1982); *United States v. Clark*, 454 U.S. 555, 560 (1982); *Trans Alaska Pipeline Rate Cases*, 436 U.S. 631, 643 (1978); *Commissioner v. Brown*, 380 U.S. 563, 571 (1965). In holding that the URA applies to public utilities otherwise qualifying for compensation under the Act, the Court of Appeals properly followed this canon of statutory construction.

The literal construction adopted by the Court of Appeals finds further support in the Act's Declaration of Policy which provides:

> The purpose of this subchapter is to establish a *uniform policy* for the fair and *equitable treatment* of persons displaced as a result of Federal and federally assisted programs *in order that such persons shall not suffer disproportionate injuries as a result of programs designed for the benefit of the public as a whole.*

42 U.S.C. § 4621 (emphasis added). To establish a *uniform* policy, Congress certainly could not have intended that some businesses displaced by federally assisted pub-

lic projects could recover relocation expenses while other businesses, simply because they are public utilities, could not. Moreover, the disproportionate injury suffered by ratepayers as the result of utility relocation is exactly the kind contemplated by the URA. Because utilities are forced to raise their rates to recover relocation expenses, their customers are forced to bear an additional burden for a project which provides them with no special benefit. In essence, ratepayers, often with low- or fixed-incomes, are asked to subsidize a federally assisted project for the benefit of many not served by the utility. This is clearly a "disproportionate" injury caused by projects "designed to benefit the public as a whole." *Id.*

Notwithstanding the foregoing statutory provisions, petitioner argues that Congress could not have intended the Act to apply to public utilities because, under the common law still followed by many states, utilities are not entitled to relocation expenses.[4] Petitioner maintains that Congress would have expressly repealed contradictory state law had it intended to reimburse utilities. Petitioner's Brief on the Merits at 14. This argument

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[4] The common law itself is not without its exceptions. In New York, for example, if the state or a municipality closes a street in order to engage in some proprietary function, it must reimburse utilities for the costs involved in relocating their facilities. *See, e.g., Consolidated Edison Co. of New York v. Lindsay*, 24 N.Y.2d 309, 316, 248 N.E.2d 150, 152-53, 300 N.Y.S.2d 321, 325 (1969); *New York Telephone Co. v. City of Binghamton*, 18 N.Y.2d 152, 160, 219 N.E.2d 184, 186, 272 N.Y.S.2d 359, 362 (1966); *New Rochelle Water Co. v. State of New York*, 10 N.Y.2d 287, 292, 177 N.E.2d 771, 773, 220 N.Y.S.2d 809, 812 (1961); *In re Gillen Place, Borough of Brooklyn*, 304 N.Y. 215, 221, 106 N.E.2d 897, 899 (1952). Moreover, where the Federal Government takes city-owned property under its power of eminent domain, the Federal Government must pay compensation to utilities whose lines are also acquired. *United States v. 25.4 Acres of Land in Borough of Brooklyn, Kings County*, 65 F. Supp. 333, 335-37 (E.D.N.Y. 1946), *rev'd on other grounds sub nom. United States v. Brooklyn Union Gas Co.*, 168 F.2d 391 (2d Cir. 1948).

ignores the overriding purpose of the URA—to establish a uniform national system of compensation, supplementing where necessary state real property compensation law.

It was precisely because state law often denied meaningful recovery to displaced persons that Congress saw a need for federal legislation. In supporting passage of the URA, Representative Cleveland voiced this dissatisfaction with existing state law, stating: "The real root of the problem is that traditional concepts of evaluation and eminent domain have proved inadequate." 116 *Cong. Rec.* 40,169 (1970). Moreover, Senator Muskie, the Chairman of the Subcommittee that conducted the Senate hearings and a major sponsor of the URA legislation, stressed: "Our primary objective in sponsoring S. 1 is to establish a uniform policy among Federal agencies, and State and local recipients of Federal funds in their dealings with property owners and others displaced by Federal or federally aided land acquisitions." [5] Senator Muskie clearly indicated his understanding of the broad purpose of this legislation when he enunciated the first of two "fundamentally humane concepts involved in this legislation . . . ." [6]

> One, that the objective ought to be to make the displacee whole, that we ought to abandon the idea that the displacee ought for some reason to bear some of the burden of cost in these Federal programs, the implementation of which necessitates his displacement.[7]

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[5] *Uniform Relocation Assistance and Land Acquisition Policies Act of 1969: Hearings on S. 1 Before the Subcomm. on Intergovernmental Relations of the Senate Comm. on Government Operations*, 91st Cong., 1st Sess. 2 (1969). This statement was also reprinted in the Senate Report. *See* Senate Comm. On Government Operations, *Uniform Relocation Assistance and Land Acquisition Policies Act of 1969*, S. Rep. No. 488, 91st Cong., 1st Sess. 7-8 (1969).

[6] *Id.* at 36.

[7] *Id.*

When the foregoing statements are taken in conjunction with the unambiguous statutory definitions and declaration of policy contained in the URA, it is clear that Congress intended to supplant the common law insofar as it would deny relocation expenses to persons and companies, including utilities, displaced as a direct result of the acquisition of property for a Federal project. For these reasons, the Court of Appeals correctly held that a public utility can qualify as a displaced person and is entitled to relief if its claim otherwise satisfies the requirements of the URA.

II. THE URA ENTITLES PUBLIC UTILITIES TO COMPENSATION FOR RELOCATION EXPENSES CAUSED BY ACQUISITION OF REAL PROPERTY IN THE EXECUTION OF FEDERALLY ASSISTED PUBLIC WORKS PROJECTS

A. Respondent Is Entitled To Relocation Benefits For The Reasons Set Forth In The Court Of Appeals' Decision

Under the URA, relocation expenses are compensable if the removal of personal property occurs "as the result of the acquisition of . . . real property, in whole or in part . . . , for a project undertaken . . . with Federal financial assistance." 42 U.S.C. § 4601(6). The Act further provides that:

> [w]henever the acquisition of real property for a . . . project undertaken by a Federal Agency in any State will result in the displacement of any person . . . the head of such agency shall make payment to any displaced person . . . for . . . (1) actual reasonable expenses in moving . . . his . . . business . . . or other personal property.

42 U.S.C. § 4622(a)(1).

Under the facts of this case, the Fourth Circuit correctly ruled that the foregoing provisions entitle respondent to relief under the URA. In deciding for respondent,

the Court of Appeals held that a utility's distribution lines are personal property in the absence of an intent by the utility to annex its lines to the real property in which they were placed. This determination is supported by ample legal authority and is in accord with standard industry practice. Surely, respondent and the great majority of American public utilities do not intend to surrender ownership and control of their distribution facilities simply because they place them on or under realty owned by governmental entities or private citizens.

Second, relocation of respondent's lines occurred as the direct result of a federally financed acquisition of real estate. It is established that petitioner purchased—with Federal assistance—the streets in which respondent's lines were located. Following release of the City of Norfolk's remaining easements in those streets, petitioner became the owner of land without the burden of preexisting servitudes. The acquisition in fee simple of the City's streets, an essential part of petitioner's redevelopment plan, required the relocation of respondent's facilities.

Under these circumstances, the Court of Appeals properly held that respondent should be reimbursed for the reasonable expenses incurred in removing its personal property from the real property purchased by petitioner. Thus, the decision below is entitled to affirmance on its own merits and for the grounds stated therein.

B. Public Utilities Are Entitled To Compensation For Relocation Expenses Caused By The Acquisition Of The Right To Use Real Property In The Execution Of Federally Assisted Public Works Projects

In addition to the grounds on which the Court of Appeals ruled as urged by respondent before this Court, the URA entitles respondent and utilities generally to compensation where an agency acquires the right to use real property in the execution of a federally assisted public works project and the acquisition of this right to use the property forces utilities to relocate their distribu-

tion lines. While the facts in the present case involve a federally assisted acquisition of the entire fee simple title to real property, the acquisition of fee simple title to realty is not critical to recovery under the URA. Such a construction is consistent with the Act's provisions, its legislative history and this Court's interpretation of the URA.

While the URA nowhere defines "acquisition," the congressional policy behind that term necessitates a broad reading, consistent with the goal of providing relief to persons displaced as a result of federally assisted projects. This is evident from the Act's Declaration of Policy, which does not even use the word "acquisition" but instead simply states: "The purpose of this subchapter is to establish a uniform policy for the fair and equitable treatment of persons displaced *as a result of* Federal or federally assisted programs. . . ." 42 U.S.C. § 4621 (emphasis added). The language, "as a result of," shows that Congress was concerned with the practical effects of federally assisted projects rather than with vagaries of real property law.

Further, this Court has recognized that Section 101(6) of the Act "does not . . . require that an agency anticipate obtaining title to the property. The legislative history demonstrates that Congress focused on the eventual right to use property, not on an agency's mode of procurement." *Alexander v. United States Department of Housing and Urban Development*, 441 U.S. 39, 62 n.41 (1979). In reaching this conclusion, the Court noted that the Act was intended to apply to situations where an agency leases a redevelopment site in lieu of directly purchasing the realty for its facilities. *Id.* The Court found support for this conclusion in the following passage of the House Committee Report on S. 1, the bill that eventually became the URA:

> It makes no difference to a person required to move because of the development of a postal facility which

> method the postal authorities use to obtain the facility, or who acquires the site or holds the fee title to the property. *Since the end product is the same, a facility which serves the public and is regarded by the public as a public building, any person so required to move is a displaced person entitled to the benefits of this legislation.*

Id., quoting from H.R. Rep. No. 91-1656, p. 5 (1970) (emphasis added).

When federally financed public works projects require the removal or relocation of existing utility lines, the ownership of the underlying realty often remains unchanged. For example, title to real property may not be held by a government agency, that is, the agency may choose to use federal funds to lease realty from the owner and construct a public building or project on the leased property. Although the agency would not acquire fee simple title to the realty, it could still require utilities to relocate their lines. Despite the absence of any purchase or sale, the impact of the public works project remains the same—public utilities and other businesses are forced to relocate. Utilities, forced to move this personal property as a direct result of such acquisitions must incur relocation costs which are ultimately passed through to consumers in the form of increased rates. It makes little difference to these utilities and their customers which mode of federally funded acquisition causes the uprooting of lines and increased rates "since," as Congress stated, "the end product is the same." *Id.* The result is the federally financed *use* of property causing the displacement of, and injury to, public utilities and their customers. *Id.* For this displacement, the provisions of the URA and its legislative history, as interpreted by this Court, require reimbursement of utility relocation expenses without reference to the manner in which Federal funds accomplish the exclusive use and occupation of the realty in question.

C. Title III Of The URA Also Provides For Alternative Compensation To Utilities Forced To Abandon Or Relocate Their Lines

Even assuming, as petitioner contends, that Titles I and II of the URA do not create a uniform law that overrides common law rules relating to payment of utility relocation expenses, Title III of the URA would still require any agency acquiring real property to pay just compensation to any utility adversely affected by such acquisition. Under Title III, a utility could elect to receive such compensation in lieu of relocation payments.

Title III of the URA creates a uniform real property acquisition policy. Section 302(a) of that title provides:

> (a) *Notwithstanding any other provision of law,* if the head of a Federal agency acquires *any* interest in real property in any State, he shall acquire at least an *equal interest* in *all* buildings, *structures, or other improvements* located upon the real property so acquired and which he requires to be removed from such real property or which he determines will be *adversely affected* by the use to which such real property will be put.

42 U.S.C. § 4652(a) (emphasis added). When a Federal or state agency[8] closes a street and acquires fee simple title it has acquired "any interest" in real property.[9] Neither the URA nor its legislative history defines "struc-

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[8] Section 305 of the URA (42 U.S.C. § 4655) makes Section 302 applicable to the states where a state agency acquires title. *See Whitman v. State Highway Commission of Missouri*, 400 F. Supp. 1050, 1070 (W.D. Mo. 1975).

[9] This language has been broadly defined. The Comptroller General of the United States has issued an opinion stating that the definition of "any interest in real property" found in Section 302(a) includes the acquisition of easements. 58 Comp. Gen. 559, 561 (1979).

tures or other improvements." However, the language of Section 302(a) makes clear that this phrase applies either to what must be removed from real property or to what "will be adversely affected by the use to which such real property will be put." 42 U.S.C. § 4652(a). Certainly, utilities forced to relocate or abandon utility lines as a result of the acquisition of real property are adversely affected within the plain meaning of this Section.

Moreover, Section 302 of the Act is designed to apply to owners of buildings, structures or other improvements who are not owners of the real property acquired.[10] Section 302(b)(1) refers to these owners as "tenants" and both the House and Senate reports provide that this Section applies to "the property of a tenant *or other person holding legal possession.*" [11] A utility holds legal possession, that is it has a legal right to occupy and use the land, even if it does not own the real property in which its structures or improvements are located.

Finally, it should be noted that although Section 302 of the Act does not provide for relocation costs it does provide for just compensation, which is defined as the greater of the "fair market value which such building, structure, or improvement contributes to the fair market value of the real property to be acquired, *or* the fair market value of such building, structure, or improvement for removal from the real property . . . ." 42 U.S.C. § 4652(b)(1) (emphasis added).

In sum, even assuming petitioner's arguments are correct, respondent would still be eligible for certain reimbursements under Title III of the URA.

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[10] *See* 42 U.S.C. § 4652(b)(1). *See also* H.R. Rep. No. 1656, 91st Cong., 2d Sess. 24 (1970), *reprinted in* 1970 U.S. Code Cong. & Ad. News 5850, 5874; S. Rep. No. 488, 91st Cong., 1st Sess. 19 (1969).

[11] *Id.* (emphasis added).

III. COMPELLING PUBLIC POLICY CONSIDERATIONS SUPPORT AFFIRMANCE OF THE DECISION BELOW

A. Reversal Of The Decision Below Will Impose A Discriminatory And Disproportionate Burden On Utility Customers And Undermine Public Confidence In Federal And Federally Assisted Programs

If a utility is denied reimbursement for the considerable costs associated with the relocation of its distribution lines, it must pass these costs on to its customers in the form of increased utility rates. This result imposes an unfair and discriminatory burden on customers who are forced to pay higher utility bills in order to subsidize the costs of federally financed projects which benefit the community as a whole.[12] This disproportionate impact runs counter to the purpose of the URA "to establish fair and equitable treatment" for displaced persons "in order that such persons shall not suffer disproportionate injuries as a result of programs designed to benefit the public as a whole." 42 U.S.C. § 4621. The legislative history of the Act provides further evidence that Congress sought to avoid this harsh and inequitable result. As Representative Annunzio stated:

> As all of us recognize, rapid population growth and technological change make imperative the Federal programs to assist in building and rebuilding our cities . . . . These programs have been enacted and must go forward for the benefit of our entire society.

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[12] An example of this unfair burden can be found in communities where some residents use natural gas provided by distribution lines and other residents use fuel oil delivered by trucks. While both groups may be benefited by a public works project, the residents using natural gas are forced to pay relocation costs while the residents using fuel oil escape such costs entirely.

> But they should not impose an undue burden upon those individuals and businesses whose properties have to be acquired to make way for the necessary improvements to benefit the rest of us.

116 *Cong. Rec.* 40,171 (1970).

The costs of utility relocation are particularly burdensome to Brooklyn Union's low-income ratepayers who at present spend an increasingly large share of their incomes on natural gas for home heating purposes. In a time of rapidly rising natural gas prices and reduced Federal spending on low-income energy assistance and home insulation programs, many of this Nation's low-income utility customers already find it difficult, if not impossible, to pay their energy bills. Reversal of the Court of Appeals' decision would thus have an unjust and inequitable impact on those least able to afford it.

In addition to its inequitable impact upon utility ratepayers, denial of utility relocation expenses may also result in the erosion of public confidence in the Federal Government and the programs it sponsors. This is precisely the fear expressed by Senator Muskie in the Senate Report which accompanied the URA. In decrying the lack of uniform treatment displaced persons receive under existing Federal programs, the Senator warned:

> This lack of uniformity only provides irritation and confusion in the communities affected. It provides an unfortunate image of the Federal Government at the State and local level. It results in a continuing and annoying conflict between Federal agencies and State and local aid recipients. And it undermines confidence in and support for Government programs.

S. Rep. No. 488, 91st Cong., 1st Sess. 7 (1969). By affirming the Court of Appeals' decision, this Court would ameliorate the legislative, administrative, and financial

inequities which caused Congress justifiably to fear a loss of public confidence and support for programs which are so essential to the public health and to the continued growth and prosperity of our Nation's economy.

CONCLUSION

By recognizing respondent's right to recover utility relocation expenses under the URA, the Court of Appeals upheld the expressed intent of Congress to provide relief for all those displaced as a direct result of federally funded projects. In holding that utilities are "displaced persons," the Court properly construed the plain and unambiguous language of the URA to effect this broad congressional purpose and refused to read an exception into the Act where none was expressed or intended.

The decision below is entitled to affirmance on the grounds stated therein. This Court should also recognize that the URA grants reimbursement to those whose personal property is displaced as a result of the acquisition of the right to use real property in the execution of federally funded public works projects. This interpretation properly focuses on the *use* to which realty is put rather than the mode of acquisition or ownership. Such a holding would insure broad and uniform relief for all utility ratepayers who currently bear a disproportionate share of the costs of federally assisted projects. Finally, this Court should recognize that Title III of the URA provides for alternative compensation to utilities forced to abandon or relocate their lines.

This Court should act to implement the provisions of the URA consistent with the intent of Congress to treat all displaced Americans fairly and equitably. In so doing the Court will promote orderly planning and use of Fed-

eral resources and restore public confidence in Federal programs and projects.

Respectfully submitted,

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Docket No. 81-2332

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

NORFOLK REDEVELOPMENT AND HOUSING AUTHORITY, a political subdivision of The Commonwealth of Virginia,

Petitioner.

vs.

THE CHESAPEAKE AND POTOMAC TELEPHONE COMPANY OF VIRGINIA.

Respondent.

BRIEF AMICUS CURIAE IN SUPPORT OF THE PETITIONERS

on behalf of

The Community Redevelopment Agencies of the City of Los Angeles, The City of Long Beach, The City of Oceanside, The City of Anaheim. The City of Pasadena, The City of Culver City, The City of Santa Ana, The City of San Diego, The City of Santa Clara, The City of Garden Grove, and The City of San Jose. California

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TABLE OF CONTENTS

		Page
STATEMENT OF INTEREST OF THE AMICI CURIAE		1
SUMMARY OF ARGUMENT		11
ARGUMENT		
I.	BOTH THE RECORD IN THIS CASE AND THE RELEVANT LAW DEMONSTRATED THAT THE FEDERAL URA APPLIES ONLY INDIRECTLY TO THE STATES	13
	A. The Uniform Relocation Act does not apply directly to State projects.	14
	B. The Complaint in this case does not rest on the direct applicability of the URA to the States	17
	C. The Patttern of the Federal Statutes is to allow the States to assure that they will give relocation benefits in return for Federal grants.	18
II.	THE COMPLAINT, AS AGAINST THE FEDERAL GOVERNMENT, IS NOT LEASED UPON ANY STATUTORY DUTY IMPOSED UPON HUD.	20
III.	THE PETITIONER AUTHORITY MADE ITS DECISION AS A STATE AGENCY AND NOT AS AN ARM OF THE FEDERAL GOVERNMENT	21

		Page
IV.	THE COURTS BELOW LACKED SUBJECT MATTER JURISDIC-TION OF THIS CASE	25
	A. Decision Rendered by a State Agency is not Receivable in the Federal District Court	25
	B. There is no Federal Question involved in this case.	28
	C. Federal cases which could be construed as approving Federal District Court jurisdiction are either irrelevant or not based on relevant authority.	34
V.	ASSUMING PROPERTY JURIS-DICTION, THE COURT OF APPEAL ERRED IN ITS REVERSAL OF THE DISTRICT COURT DECISION	42
	A. Introduction	42
	B. Congress has not abrogated the common law rule	45
	C. The District Court's Decision Recognizes the Appropriate Rule	48
	D. Utility Relocation Costs Should Be Left to the Legislature	52
CONCLUSION		56

TABLE OF AUTHORITIES

CASES

	Page
Andrews v. City of San Bernardino 175 Cal.App. 2d 459, 346 P2d 457 (1959)	2
Appalachian Power Co. v. City of Huntington 210 S.E. 2d 471 (W.Va. 1974)	49
Artesian Water Co. v. State Dept. of Highways & Transportation 330 A.2d 432 (Del 1974)	49
Barnhart v. Brinegar 362 Fed. Supp. 464 (W.D. Mo. W.D. 1973)	21,36
Beaird-Poulan Dir. etc. v. Dept. of Highways 441 Fed. Supp. 866 (W.D. Ca. 1977) aff'd 616 Fed 2d 255 (5th Cir 1980) cert. den. (Rehnquist dissenting) 449 U.S. 971, 66 L.Ed. 2d 234, 101 S.Ct. 383; reh. den. 449 U.S. 1104, 66 L.Ed. 2d 832, 101 S.Ct. 903	37,39
Berman v. Parker 348 U.S. 26, 99 L.Ed. 27, 75 S.Ct. 98 (1954)	42
Boston v. United States 424 Fed. Supp. 259 (E.D. Mo. 1976)	40
Bristol Tennessee Housing Author'ty v. Bristol Gas Co. 407 S.W. 2d 681 (Tenn. 1966)	49

	Page
Califano v. Sanders 430 U.S. 99, 51 L.Ed 2d. 192, 97 S.Ct. 980 (1977)	39
Caramico v. Secretary of the Dept. of Housing & Urban Devel. 509 Fed 2d 694 (2d Cir., 1974)	34
Chicago, Rock Island & Pacific Railroad Co. v. Stude 346 U.S. 574, 98 L.Ed. 317, 74 S.Ct. 290 (1954)	11,26, 28,37
City of Center Line v. Michigan Bell Telephone 182 N.W. 2d 769 (Mich. 1970)	50
City of Columbus v. Indiana Bell Telephone Co. 281 N.E. 2d 510 (Ind. 1972)	50
Consumer Power Ca. v. Costle 615 Fed 2d 1147 (6th Cir. 1980)	49
Dawson v. U.S. Dept. of Housing & Urban Devel. 28 Fed. Supp. 328 (N.D. Ga. 1976)	35,40
Department of Transportation & Devel. of La. v. Beaird-Pouland, etc., Inc. (denial of cert; Justice Rehnquist dissenting) 449 U.S. 971, 66 L.Ed. 2d 234, 101 S.Ct. 383	12,20, 25
Estate of Hering 108 Cal.App. 3d 88, 166 Cal.Rptr. 298	47

	Page
Gully v. First Nat'l Bank in Meridian 299 U.S. 109, 81 L.Ed. 70, 57 S.Ct. 96 (1936)	12,30, 31,33
Janett v. Norfolk Redevelopment & Housing Authority 74 Fed. Supp. 585 (E.D. va. 1947) aff'd 169 Fed.2d 409 (4th Cir. 1948) cert. den. 335 U.S. 886 (1948)	23
Ledesma v. Urban Renewal Agency of Edinburg 432 Fed.Supp. 564 (S.C. Texas 1977)	35
Lewis v. Brinegar 372 Fed. Supp. 424 (W.D. Mo 1974)	37,38, 39,41
Logue v. United States 412 U.S. 521 37 L.Ed. 2d 121, 93 S.Ct. 2215 (1973)	24
Lone Star Gas Co. v. Moon Landrieu No. 80-100-C (E.D. Okla., March 30, 1981)	49
Moorer v. Dept. of Housing & Urban Devel. 417 Fed. Supp. 1261 (W.D. Mo. 1976)	35,40
Mountain States Telephone & Telegraph Co. v. Boise Redevelopment Agency 607 P.2d 1084, 101 Idaho 30 (1980)	49
National Surety Corp. v. Chamberlain 171 Fed. Supp. 591 (D.C. N.D. Texas 1959)	26,27

	Page
Nelson v. Brinegar 420 Fed. Supp. 975 (E.D. Wisc. 1976)	36
Pacific Telephone & Telegraph Co. v. Redevelopment Agency of the City opf Glendale 87 Cal.App. 3d 296, 151 Cal.Rptr. 68 (1978)	8,45, 49,52
Pacific Telephone & Telegraph Co. v. Redevelopment Agency of the City of Redlands 75 Cal.App. 3d 957, 142 Cal.Rptr. 584 (1978) (hrg. by Cal. Sup. Ct. den.)	8
Parden v. Railway of the Ala. St. Dock's Dept. 377 U.S. 184, 12 L.Ed.2d 233, 84 S.Ct. 1207 (1964)	38
Parlene Sportswear Company, Inc. v. Weinberger 513 Fed. 2d 835 (1st Cir. 1975). cert. den. 423 U.S. 925, 46 L.Ed.2d 252, 96 S.Ct. 269	34
Public Services of Oklahoma v. Harris No. 79-C-37-35 (N.D. Okla, Aug 22, 1980)	49
Redevelopment Agency of the City of Berkeley v. City of Berkeley 80 Cal.App. 3d 158, 143 Cal.Rptr. 633 (1978)	2
Saala v. McFarland 63 Cal.2d 124, 45 Cal. Rptr. 144 (1965)	47

	Page
Seeherman v. Lynn 404 Fed. Supp. 1318 (M.D. Pa 1975)	40
So. Union Gas Co. v. City of Artesia 472 P.2d 368 (N. Mex. 1970)	49
Tullock v. State Highway Comm of Mo. 507 Fed 2d 712 (8th Cir 1974)	37,38 40
United States v. Orleans 425 U.S. 807, 48 L.Ed. 2d 390, 96 S.Ct. 1971 (1976)	25
Whitman v. State Highway Comm'n of Mo. 400 Fed. Supp. 1040 (W.D. Mo. 1975)	40
Will-Tex Plastic Mfg. Inc. v. Dept. of Housing and Urban Devel. 347 Fed. Supp. 903 (E.D., Pa. 1972)	36

FEDERAL STATUTES

AND REGULATIONS

	Page
5 U.S.C. §§701-706 ("APA")	39,40,41
28 U.S.C. §1331(a)	12,28,41
42 U.S.C. §1437	4
42 U.S.C. §1451(b)	18
42 U.S.C. §1452(b)	4
42 U.S.C. §1453	17,18
42 U.S.C. §1455	18
42 U.S.C. §1466	4
42 U.S.C. §4601 et seq. ("URA")	6,13,14,15, 16,17,21,27,28,29,34,35,39,45,47,48,52
42 U.S.C. §4601(6)	8,9
42 U.S.C. §4602(a)	36
42 U.S.C. §4622	15
42 U.S.C. §4623	15
42 U.S.C. §4624	15
42 U.S.C. §4625	16
42 U.S.C. §4626	16
42 U.S.C. §4627	16
42 U.S.C. §4628	16
42 U.S.C. § 4630	7,18,35
42 U.S.C. §4651	16

	Page
42 U.S.C. §4652	16
42 U.S.C. §4653	16
42 U.S.C. §4654	16
42 U.S.C. §5301 et seq.	4
Public Law No. 92-495 (Dist. of Columbia Public Utilities Reimbursement Act of 1972)	54
24 CFR §570.450 et seq.	4
42 CFR	20,21,29

STATE CONSTITUTIONAL PROVISIONS AND STATUTES

	Page
California	
Constitution	
Art XIIIA ("Prop. 13")	5
Art XVI §16	3
Government Code	
§7260	6,7,8,47
§7272.3	6
Health & Safety Code	
33000 et seq (Community Redevelopment Law)	1,2
§33030	2
§§33035-33039	2
§33037(c)	2,3
§33071	1,2
§33415	6
§§33600-33601	3
§§33670-33679	4,5
Public Utilities Code	
§30631	51

	Page
Streets & Highways Code	
§702	51
§703	51
Water Code	
§8617.5	51
Virginia	
§§9-6, 14:16(ii)	28
§§9-6, 14:40	28
§25-235 et seq. ("Va.URA")	24,27,47
§25-238	6,23 28
§25-239(a)	23
§36-1 et seq.	23
§36-26	24

ARTICLES

	Page
Wescher, Federal Jurisdiction and the Revision of the Judicial Code, 13 Law & Contemp. Prob. 216 (1948)	27

Docket No. 81-2332

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

NORFOLK REDEVELOPMENT AND HOUSING AUTHORITY, a political subdivision of The Commonwealth of Virginia,

Petitioner,

vs.

THE CHESAPEAKE AND POTOMAC TELEPHONE COMPANY OF VIRGINIA,

Respondent.

BRIEF AMICUS CURIAE IN SUPPORT OF THE PETITIONERS

on behalf of

The community Redevelopment Agencies of the City of Los Angeles, The City of Long Beach, The City of Oceanside, The City of Anaheim. The City of Pasadena, The City of Culver City, The City of Santa Ana, The City of San Diego, The City of Santa Clara, The City of Garden Grove, and The City of San Jose, California.

STATEMENT OF INTEREST OF THE AMICI CURIAE

These California redevelopment agencies, political subdivisions of the State of California, respectfully submit this brief amicus curiae pursuant to Rule 36 of the Rules of this Court.

1. Introduction

Each of these amici is a public body, corporate and politic, created pursuant to the Community Redevelopment Law of the State of California, (California Health and Safety Code §§ 33000 et seq.), and exercising the powers provided therein. A fundamental purpose of the California Legislature in enacting the Community Redevelopment Law was "to expand the supply of low and moderate-income housing, to expand employment opportunities for jobless, underemployed, and low-income persons, and to provide an environment for the social, economic, and psychological growth and well-being of all citizens,"

(Calif. Health & Safety Code § 33071) through the elimination and prevention of blight (Calif. Health & Safety Code §§ 33030, 33035-33039).

In carrying out these governmental functions of state concern, (Calif. Health & Safety Code § 33037, subd. (c)), these redevelopment agencies operate as an administrative arm of the State. Redevelopment Agency of the City of Berkeley v. City of Berkeley 80 Cal.App.3d 158, 143 Cal.Rptr. 633, 639 (1978); Andrews v. City of San Bernardino 175 Cal.App.2d 459, 346 P.2d 457, 459 (1959).

Under the California Community Redevelopment Law, redevelopment agencies in California are authorized to spend public money and acquire private property to further the interest of the public health, safety, and welfare of the State and of the communities in which blighted areas exist (Calif. Health & Safety Code § 33037,

subd.(c)). A redevelopment agency may borrow money or accept financial assistance from the State or the Federal Government, and may borrow money (by the issuance of bonds or otherwise) or accept financial or other assistance from any private lending institution or any public or private source to carry out the purposes of the California Community Redevelopment Law (Calif. Health & Safety Code §§ 33600-33601).

Although the redevelopment agencies have no taxing authority, a primary source of funding for the redevelopment agencies is the use of "tax increment" generated by funding for the redevelopment activities; that is, an allocation to the redevelopment agencies of a portion of the increase in property taxes resulting from increased property valuation because of new development in a redevelopment project area after the adoption of a redevelopment plan. (See: Calif. Constitution, Article XVI, Section

16; Calif. Health & Safety Code §§ 33670-33679).

Another source of funding for the California redevelopment agencies has been federal assistance, including assistance provided pursuant to various programs administered by the Department of Housing and Urban Development ("HUD"). A number of HUD programs have provided funding or other assistance for redevelopment activities in California. These are the federal rehabilitation assistance programs authorized by 42 U.S.C. § 1452b (the "Section 312" program) and 42 U.S.C. § 1466 (the "Title I" program), the low-income housing assistance program authorized by 42 U.S.C. § 1437 et seq. (the "Section 8" program) and the Community Development Block Grant program authorized by 42 U.S.C. § 5301 et seq., including the program of Urban Development Action Grants set forth in the HUD regulations at 24 CFR § 570.450 et seq.

The amounts available to redevelopment agencies under various sources of funding have been decreasing in recent years. In California, the amount of "tax increment" available under Health & Safety Code § 33670 et seq. has, since 1978, been subject to the property tax limitations of "Proposition 13" (Cal. Const. Art. XIII A). In addition, the amount of federal assistance available has been decreased. Thus, the effect of imposing additional expenditure requirements upon redevelopment agencies, (i.e., to reimburse private utility companies for relocating their facilities), will be to reduce the scope of the actual redevelopment activities which an agency may perform, to postpone desperately needed low and moderate income housing projects, and to prolong the existence of blight.

When it acquires property in order to carry out its functions under the Community Redevelopment Law, a redevelopment agency

is subject to the California Relocation Assistance Law, Government Code § 7260 et seq., and is obliged to make the payments required thereby. (Calif. Health & Safety Code § 33415). The California Relocation law is similar to both the Federal Uniform Relocation Act (Title 42 USC § 4601 et seq.) ("URA") and the Virginia Uniform Relocation Act (Code of Va. § 25-235 et seq.)

California's relocation law allows both for payments to defined persons and additional payments so as to permit redevelopment agencies to obtain federal assistance for their projects. California Government Code Section 7272.3 provides:

> It is the intent of the Legislature, by this chapter, to establish minimum requirements for relocation assistance payments by public entities. This chapter shall not be construed to limit any other authority which a public entity may have to make other relocation assistance payments, or to make any relocation assistance payment in an amount which exceeds the maximum amount for such payment authorized by this chapter.

> Any public entity may also, make any other relocation assistance payment, or may make any relocation assistance payment in an amount which exceeds the maximum amount for such payment authorized by this chapter, if the making of such payment, or the payment in such amount, is required under federal law to secure federal funds.

This is State authority to allow redevelopment agencies to provide assurances to the Federal Government that the requirements of 42 U.S.C. § 4630 are being met in order to obtain a grant or other assistance.

In defining persons eligible for relocation assistance, the California Relocation Assistance Law identifies those persons eligible for relocation assistance in a manner closely akin to the comparable federal statute. A "displaced person" is defined (in pertinent part) in the California Government Code § 7260 as follows:

> "(c) 'Displaced person' means any person who moves from real

> property, or who moves his personal property from real property, as a result of the acquisition of such real property, in whole or in part, by a public entity or by a person having an agreement with or acting on behalf of a public entity, or as the result of a written order from a public entity to vacate the real property, for public use."

The similarities between the principal provisions of California Government Code § 7260 and 42 U.S.C. § 4601 (6) are rather obvious.

In construing California Government Code § 7260 et seq., California courts have held that those provisions do not override the common law rule that public utilities are not included in the definition of "displaced persons" (See: Pacific Telephone & Telegraph Co. v. Redevelopment Agency of the City of Redlands 75 Cal.App.3d 957, 142 Cal.Rptr. 584 (1978) (hrg by Cal. Sup. Ct. den.) and Pacific Telephone & Telegraph Co. v. Redevelopment Agency of the City of

Glendale, 87 Cal.App.3d 296, 151 Cal.Rptr. 68 (1978).

The opinion of the Fourth Circuit in this case, construing Title 42 U.S.C. § 4601 (6) could be used to interpret other similar State statutes in California and throughout the country. Thus, one impact of the appellate decision in this case is rather obvious: it will permit utility companies to make yet another attempt to overturn the long-standing rule made by the courts of the very States which regulate them.

But there is a further, and more direct adverse result of the Fourth Circuit decision. It will, if affirmed, diminish the ability of California Redevelopment Agencies to carry out their essential governmental functions when receiving federal assistance by diverting scarce monetary resources from activities necessary to eliminate blighting conditions to reimbursing privately-owned, for-profit

utility companies for their costs in relocating their facilities when such relocation is required for redevelopment purposes. The practical effect of the Court of Appeals' decision will be to reduce the ability of State and local governments to eliminate blight in their communities by imposing upon them additional financial burdens at a time when the resources available for such purposes are being diminished or eliminated.

Of paramount importance to these amici curiae is that the decision of the Fourth Circuit would, at least implicitly, authorize review by federal courts of the decisions of State agencies pursuant to their authority under State law. Because the granting or denying of benefits by such an agency does not arise "... under the Constitution, laws or treaties of the United States...", and because this case is a review of a decision of a State agency,

the Federal District Court had no jurisdiction to proceed with the case.

SUMMARY OF ARGUMENT

The Respondent's Complaint is based upon Federal statutes which do not, even impliedly, extend a cause of action for payment of benefits. Yet that is exactly what, in reality, the Respondent seeks. The Federal Uniform Relocation Act may support other causes of action but not the one brought by the Respondent. Thus, the Respondent's Complaint does not show jurisdiction on two grounds:

First, that Complaint is nothing more than an appeal from an administrative decision of a State agency, and this Court has stated that district courts do not sit to review such decisions (See Chicago, Rock Island & Pacific Railroad Co. v. Stude 346 U.S. 574, 581, 98 L.Ed. 317, 74 S.Ct. 290 (1954)) and the opinion of Justice Rehnquist (dissenting from an order denying

certiorari) in Department of Transportation & Devel. of La. v. Beaird-Poulan, Inc. 449 U.S. 971, 66 L.Ed.2d 234, 101 S.Ct.383, rendered after the Complaint and Answer were filed herein).

Second, the clear statutory scheme shows that there is no right, under the Federal statutes relied upon by the Respondent, to bring an action against the Federal Government for relocation benefits. Thus, the Respondent's Complaint does not show that a Federal question has been raised. This Court has held that the existence of a question of interpretation of Federal statute is insufficient to support Federal question jurisdiction and Title 28 U.S.C. § 1331(a) (See: Gully v. First Nat'l Bank in Meridian 299 U.S. 109, 81 L.Ed 70, 57 S.Ct. 96 (1936)). In viewing the actual claims and progress of the Complaint, it is evident that there is no Federal jurisdiction.

Assuming there was jurisdiction, the Court of Appeals was incorrect in ignoring the impact of the Uniform Relocation Act on common law. The rule that public utilities are not reimbursed for their relocation expenses unless specifically authorized by legislative enactment has been accepted throughout the country and even by Congress itself. The existence of that rule and the effect of a contrary rule on the people of our cities, demand that the decision of the Court of Appeals be reversed.

ARGUMENT

I.

BOTH THE RECORD IN THIS CASE AND THE RELEVANT LAW DEMONSTRATE THAT THE FEDERAL URA APPLIES ONLY INDIRECTLY TO THE STATES

Although these California amici agree with the result reached in the District Court denying relocation assistance to Respondent Chesapeake & Potomac Telephone Co. of Virginia ("C & P"), they contend that neither the District Court nor the Circuit

Court of Appeals had subject matter jurisdiction. A review of the record, the URA, and pertinent decisions, shows that this case involves the interpretation of state law, that the URA does not directly apply to the States and that a review of a State administrative decision is not within the jurisdiction of a federal district court.

A. The Uniform Relocation Act does not apply directly to State projects

In considering the authority under which the Petitioner Norfolk Redevelopment & Housing Authority ("Petitioner Authority" or "NHRA") was acting in denying the claim of C & P, it is appropriate to first consider whether Congress manifested an intent to apply the URA directly to the States. A review of the URA shows no such intent. Nowhere does Congress express any desire to supplant State law.

First, the URA's primary emphasis is upon the proper payment of relocation

benefits when a federal project is undertaken. With limited exceptions, the URA refers wholly to "Federal programs or projects" and to "Federal agencies." The URA sets out requirements for those Federal agencies when they undertake such projects. Title 42 U.S.C. § 4622 (regarding the payment of moving and related expenses) provides one of many examples:

> "(a) Whenever the acquisition of real property for a program or project undertaken by a Federal agency in any State . . . ." (Emphasis added).

Title 42 U.S.C. § 4623 (regarding replacement housing for homeowner-Mortgage insurance) provides:

> "(a)(1) In addition to payments otherwise authorized by this title, the head of the Federal agency shall . . . ." (Emphasis added).

Title 42 U.S.C. § 4624 (regarding replacement housing for tenants) likewise directs "The head of the Federal agency" to make certain payments. Similar references

to displacement resulting from Federal programs or projects or directions to the "head of the Federal agency" are found in Title 42 U.S.C. §§ 4625, 4626, 4627, 4628, 4651, 4652, 4653, and 4654.

The clear pattern established by these references is that Congress imposed certain obligations regarding relocation on Federal agencies engaging in Federal projects.

The only direct application of the URA to State agencies occurs when the State agency acts as the agent of the Federal government. This is taken up in Title 42 U.S.C. § 4628:

> "Whenever real property is acquired by a State agency at the request of a Federal agency for a Federal program or project, such acquisition shall, for the purpose of this Act, be deemed an acquisition by the Federal agency having authority over such program or project."

Thus, at least implicitly, when a State agency acts as the agent for a Federal agency in carrying out a Federal project, it

is bound directly by the provision of the URA.

The URA does not contain any other provisions which directly bind the State to its requirements or which bind HUD to paying relocation benefits for a State project. Just as importantly, there is no direct conferral of authority on the State to pay relocation expenses in connection with a State project in the URA.

B. The Complaint in this case does not rest on the direct applicability of the URA to the States

The Complaint, (Joint Appendix [hereinafter "J.A."] p. 1-14), refers to the character of the Federal involvement in the projects which are the subject of this action.

Paragraph 3 of the Complaint states that HUD contracted with the Petitioner Authority to make grants pursuant to Title 42 U.S.C. § 1453. But here again, there is no direct requirement, either on HUD or on

State agencies to pay relocation benefits in connection with State projects. The fundamental duty is one which is imposed on the Secretary of HUD to comply with various restrictions before entering into a grant contract (see Title 42 U.S.C. §§ 1451(b) and (c), 1453 and 1455).

Since none of the other statutes cited by Respondent C & P impose a direct duty on the States to extend relocation benefits, it follows that such a requirement, if it exists, is placed upon them indirectly.

C. **The pattern of the URA is to allow the States to assure that they will give relocation benefits in return for Federal grants**

The only provision that deals with the providing of relocation benefits by State agencies engaging in State projects is Title 42 U.S.C. § 4630, which provides:

> "Notwithstanding any other law, the head of a Federal agency shall not approve any grant to, or contract or agreement with, a State agency, under which Federal financial assistance will be

> available to pay all or part of the cost of any program or project which will result in the displacement of any person ... unless he receives satisfactory assurances from such State agency that --
>
> (1) fair and reasonable relocation payments and assistance shall be provided to or for displaced persons, as are required to be provided by a Federal agency under sections 202, 203, and 204 of this title;
>
> (2) relocation assistance programs offering the services described in section 205 shall be provided to such displaced persons;
>
> (3) within a reasonable period of time prior to displacement, decent, safe, and sanitary replacement dwellings will be available to displaced persons in accordance with section 205(c)(3)." (Emphasis added).

Thus, a State agency may not receive federal assistance unless it assures the Federal agency that the same sort of assistance as required of Federal agencies by the Act will be provided in those State projects assisted with federal funds. It is the carrot of federal funds (which may be

withheld) and not the stick of private suits regarding State agency relocation decisions that Congress chose as the means of providing relocation payments to those displaced by State agencies in federally-assisted projects. (See the dissent of Justice Rehnquist in the denial of certiorari in Department of Transportation & Devel. of La. v. Beaird-Poulan, Inc., supra. (Also see 42 CFR §§ 42.1 and 42.5(a)).

II.

THE COMPLAINT, AS AGAINST THE FEDERAL GOVERNMENT IS NOT BASED UPON ANY STATUTORY DUTY IMPOSED UPON HUD

What has been said thus far shows that the duty of HUD under applicable statutes, is to assure itself, before approving a grant or entering into a grant contract, that the State agency will extend relocation benefits. But there is no allegation that the assurances were not made by the

Petitioner Authority, or that HUD breached any other statutory duty (see Complaint, J.A. pp. 1-14). Instead, the Complaint is based upon the theory that the State agency did not give those benefits which it should have. The above examination of the URA shows that there is no requirement therein for the Secretary to order compliance with its terms.[1]

III.

THE PETITIONER AUTHORITY MADE ITS DECISION AS A STATE AGENCY AND NOT AS AN ARM OF THE FEDERAL GOVERNMENT

The record is replete with references to the character of the action taken. It

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[1] It may be argued that the Complaint, properly drafted, would refer to Title 42 of the Code of Federal Regulations. But, in fact, the Complaint does not purport to sate a cause of action by C & P as a "third party beneficiary" of the Code of Federal Regulations. Nor does it rely on any interpretation of the CRF as to its eligibility for payments thereunder. In any case, such a theory, even if it had been presented, would not provide a federal cause of action (see the logic and cases set forth in Barnhart v. Brinegar (W.D. Mo., 1973) 362 Fed. Supp. 464, 473-478 and argument infra).

was not a federal action, but one undertaken by a State agency pursuant to its authority under State law. For example, the Complaint identifies the Petitioner Authority as "... a political subdivision of the State of Virginia ...." (J.A. p.2, par.1). The redevelopment/conservation plans were adopted by the Petitioner Authority and the City of Norfolk, Virginia (J.A. pp 38-39). The Petitioner Authority acquired the land abutting the streets where the Respondent's lines were laid (J.A. p. 39). The City of Norfolk closed those streets (J.A. pp. 40-41). The Petitioner Authority has disposed of, or offered to dispose of the land formerly constituting the said streets (J.A. pp 41-42). The Petitioner Authority acquired property within the project areas pursuant to the redevelopment plans adopted by the Authority and the City (J.A. p. 44). The approval of the utility relocation was performed by the Authority (J.A. p. 45).

Further supporting the State character of the decision is the law of the State of Virginia. Its provisions identify redevelopment agencies as creatures of the State. The Petitioner Authority is an agency created under State law charged with certain redevelopment and housing responsibilities (see 36 Code of Va. § 36-1 et seq., and Janett v. Norfolk Redevelopment & Housing Authority 74 Fed.Supp. 585, (E.D. Va., 1947) aff'd. 169 Fed. 2d 409 (4th Cir. 1948), cert. den. 335 U.S. 886 (1948)). Specific among those responsibilities is the requirement to pay relocation benefits. Code of Va. §§ 5-235 et seq. set forth these requirements, and § 25-239(a) provides the general rule:

> "(a) Whenever the acquisition of real property for a program or project undertaken by a State agency will result in the displacement of any person, on or after April ten, nineteen hundred seventy-two, such agency shall make fair and reasonable relocation payments to displaced persons as required by this chapter...."

Nowhere in the relocation assistance chapter of the Virginia Code (§ 25-235) and nowhere in the general powers provisions of the Virginia Code is there any provision which magically turns these State powers into federal benefits. The only Virginia statutory provision which deals with this point is § 36-26 of the Virginia Code which, like the comparable California statute, allows Virginia redevelopment and housing authorities to make payments so as to comply with conditions for the receipt of federal funds.

In considering the liability of the Federal Government for the negligent acts of State and private employees, this Court has repeatedly pointed out that contracts or grants to the State or private employers do not make the employees agents of the United States (see Logue v. United States 412 U.S. 521, 37 L.Ed.2d 121, 93 S.Ct. 2215

(1973) and United States v. Orleans 425 U.S. 807, 48 L.Ed.2d 390, 96 S.Ct. 1971 (1976)).

From all of the above, it is clear that the receipt of a grant from HUD to assist in local redevelopment does not turn a State agency into a Federal one. Even a conditional grant does not make the Petitioner Authority into an agent of the Federal Government.

IV.

THE COURTS BELOW LACKED SUBJECT MATTER JURISDICTION OF THIS CASE

A. A Decision Rendered by a State Agency is not Reviewable in the Federal District Court.

In an opinion which was rendered on November 3, 1980, (well after both the Complaint and Answer were filed in this case), Justice Rehnquist discussed the question of federal district court jurisdiction of cases such as this (Department of Transportation & Devel. of La. v. Beaird-Poulan, Inc. supra, 449 U.S. 971).

Justice Rehnquist's dissent in that case is, these California amici contend, the correct view of the law. Certainly, without more, no federal district court has jurisdiction to hear an appeal from a State administrative decision. As this Court said in Chicago, Rock Island & Pacific Railroad Co. v. Stude 346 U.S. 574, 581, 98 L.Ed 317, 74 S.Ct. 290 (1954),

> "The United States District Court for the Southern District of Iowa does not sit to review on appeal taken administratively or judicially in a state proceeding."

This policy was utilized by the District Court in National Surety Corp. v. Chamberlain 171 Fed.Supp. 591 (N.D. Texas 1959), as one of its reasons for dismissing an insurance carrier's appeal from a State industrial accident board. In rendering its decision, the Court stated:

> "The Stude case seems to hold clearly enough that a federal district court, being limited to original jurisdiction, is without authority to try and adjudicate a

> controversy by 'appeal' or review de novo prosecuted from administrative proceedings initiated and conducted under the authority of a state statute; and, of course, under such ruling the subject of amount in controversy became altogether immaterial to the decision." (171 Fed.Supp at p. 597).

The National Surety Court proceeded to explain the policy behind its ruling, which policy applies to this case as well. Quoting from Wechsler, Federal Jurisdiction and the Revision of the Judicial Code, 13 Law and Contemp. Prob. 216 (1948), the Court stated:

> "'This method has the virtue of preserving for final resolution by state agencies any issues in the case that turn upon state law; the more numerous or weightier such state ingredients, the more important it may be to have them first determined by state courts.'"

A comparison of the State and Federal URA is enough to convince one that a State court in interpreting State law, could have fully dealt with all of Respondent C & P's questions, and may possibly have

interpreted "displaced person" (Code of Va. § 25-238 (c)) so as to extend relief to the Respondent. Thus, the policies behind this Court's decision in Rock Island & Pacific Railroad Co. v. Stude, supra, apply to this case.

State law allows for a review of decision such as this (Code of Va. §§ 9-6, 14:16(ii) and 9-6, 14-40), and Respondent should have pursued its review there.

B. There is no Federal Question involved in this case.

There is another reason why this Court should determine that the Federal District Court did not have jurisdiction of this case: this is not an action arising "... under the Constitution, laws, or treaties of the United States." (Title 28 U.S.C. § 1331(a)).

The Respondent C & P brought this action, and it chose to base it on its alleged entitlement to benefit payments pursuant to 42 U.S.C. §§ 4601 et seq. (J.A.

pp. 2 & 13). The Respondent further requested relief in the form of a declaratory relief interpreting Title 42 U.S.C. §§ 4601 et seq. to its liking and a writ of mandate compelling the Secretary of HUD to order the State agency to pay benefits.

But, as has previously been pointed out, Title 42 U.S.C. §§ 4601 et seq. do not require the Secretary to do any such ordering. Instead, it requires him to obtain assurances before approving a grant. But the record at least implies that this approval was given long before the Complaint was filed (see J.A. p. 3, 65).

Thus, the Respondent chose to rely on a Federal statute which does not confer the relief he seeks.[2] (The Petition for Writ of

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[2] The Respondent may rely on 42 CFR for the proposition that the Secretary has the power thereunder to make the order requested. There are several difficulties with this proposition. First, 42 CFR §42.5 requires agreeing State agencies to abide by the terms of 42 CFR, not some statute. No attempt at interpreting the regulations

Certiorari filed before this Court further indicates that the amounts approved have been paid and "settled" and that HUD will not pay any more. (The clear inference is that the Petitioner Authority may now be obliged to pay amounts which were not meant to be covered by the grant or any other source of income to the Authority).

It is clear that Federal Courts require more than just an interpretation of a Federal statute to obtain jurisdiction. The right of action must be a Federal one as well. In addition, the Federal question must resolve the dispute. This Court made these statements in Gully v. First Nat'l

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2 (cont.) was requested by Respondent below. Nor did the Respondent rely on any regulation for its relief. Second, there is a substantial question as to the existence of a right of action on the basis of an agreement between HUD and the Petitioner. Barnhart v. Brinegar, supra, points out that if there is no other judicially recognized right, an agreement to abide by regulations will not create one (see 362 Fed.Supp. 473-478).

Bank in Meridian 299 U.S. 109, 81 L.Ed. 70, 57 S.Ct. 96 (1936).

Gully involved a suit by the Mississippi State Tax Collector against a bank which succeeded a dissolved bank and which had agreed to assume all of the dissolved bank's obligations. Among those obligations was a state tax, which, of course, can only be imposed on a National Bank consistently with Federal statutes. The case was removed from the State courts to the Federal District Court.

In reversing the Federal Appellate decision, this Court stated:

> "Not every question of federal law emerging in a suit is proof that a federal law is the basis of a suit. The tax here in controversy if valid as a tax at all, was imposed under the authority of a statute of Mississippi. The federal law did not attempt to impose it or confer upon the tax collector authority to sue for it. True, the tax, though assessed through the action of the state, must be consistent with the federal statute.... [But] that there is a federal law permitting such taxation does not

> change the basis of the suit, which is still the statute of the state, though the federal law is evidence to prove the statute valid."

The Court proceeded further:

> "Here the right to be established is one created by the state. If that is so, it is unimportant that federal consent is the source of state authority."

In this case, the authority to give relocation benefits is not found in Federal law. In order to receive them, an applicant must show that he or she is entitled to them under State law. If no redevelopment project is undertaken by the State agency, or if the State agency does not require the claimant to move, then there is no State authority to give benefits, and the Federal law does not create any.

Of course, when the State agency does these things, it must, in order to qualify for Federal assistance, take action within the limits of the Federal condition (just as a State can tax a national bank only within

the limits of Federal Statute). But those limits do not change the basis of the relocation benefit authority. It is not Federal, but State.

Although Respondent's Complaint is restricted to consideration of Federal statutes, the Federal nature of the asserted rights is illusory. As has been previously pointed out, the Federal statutes cited do not relate either directly to the States or to the sort of action by the Secretary of HUD requested by the Respondent in its complaint. The substantive regulations have never been raised by it (see footnote 2 herein).

Under these circumstances, the rationale expressed by this Court in Gulley v. First Nat'l Bank in Meridian, supra, ought to be applied. In reality there is no Federal question, only a further review of a State agency determination.

C. **Federal Cases which could be construed as approving Federal District Court jurisdiction are either irrelevant or not based on relevant authority.**

In response to all of the arguments presented above, the Respondent may reply that there are many Federal District and Appellate Court cases which ought to support district court jurisdiction in this case. In fact, however, those cases do not support such jurisdiction.

The Federal cases which have thus far dealt with the URA can be divided into four groups.

First, there is a group of URA cases in which an attack is made on a Federal program being undertaken by a Federal agency. (See: Parlane Sportswear Company, Inc. v. Weinberger, 513 Fed.2d 835 (1st Cir.) cert. denied, 423 U.S. 925, 96 S.Ct. 269, 46 L.Ed. 2d 252 (1975); Caramico v. Secretary of The Department of Housing and Urban Development, 509 Fed.2d 694 (2d Cir.,

1974); Dawson v. U.S. Dept. of Housing and Urban Development, 428 Fed.Supp. 328 (N.D. Ga., 1976); (Moorer v. Dept. of Housing and Urban Development, 417 Fed.Supp. 1261 (W.D. Mo., 1976). Since the URA applies directly to the Federal agencies, these cases do not apply to the discussion of this case.

Second, there is a group of cases where a Federally-assisted State project is involved, but where the attack is based on the claim that the Federal agency did not receive adequate advance assurances from the State agency to approve the grant or contract, pursuant to Title 42 U.S.C. §4630. (See: Jones v. District of Col. Redevelopment Land Agency, 499 Fed.2d 502 (1st Cir., 1974) affirmed 488 Fed.2d 559 (9th Cir. 1973), cert. denied 409 U.S. 890, 93 S.Ct. 105, 34 L.Ed. 2d 147 (1971)). Obviously, when a plaintiff is attacking a Federal official to enforce a mandate of Federal statute on that official, juris-

diction is present in the appropriate case. There is no relevance to this case where, in essence, the Respondent is suing to "clear up" a Federal statute in the hope that such a clarification will result in an order to the Federal official to order a State official to pay benefits to the Respondent.

Third, there is a group of cases in which the plaintiffs are challenging State agency acquisition procedures. (See: Nelson v. Brinegar. 420 Fed.Supp. 975 (E.D. Wisc. 1976); Barnhart v. Brinegar, supra; Will-Tex Plastic Mfg., Inc. V. Dept. of Housing and Urban Development, 347 Fed.Supp. 903 (E.D. Pa. 1972). Since 42 U.S.C. § 4602 (a) bars all judicial review of acquisition procedures, these cases are also not relevant to this discussion.

Fourth, there are cases which have held or implied that Federal courts do have jurisdiction to hear reviews of State agency relocation benefit decisions in

connection with Federally-assisted projects. The analysis in those cases is not adequate or is simply irrelevant.

In considering these cases, it should be pointed out that none of them consider Chicago, Rock Island & Pacific Railroad Co. v. Stude, supra, or later references to it. As a result, the prohibition against utilizing Federal Courts to review State agency decisions is not discussed.

Three cases considering Federal Court jurisdiction (at least impliedly are Tullock v. State Highway Comm. of Mo. 507 Fed 2d 712 (8th Cir. 1974); Lewis v. Brinegar 372 Fed.Supp. 424 (W.D. Mo. 1974); and Beaird-Poulan Div. etc. v. Dept. of Highways, 441 Fed.Supp. 866 (W.D. La. 1977) aff'd. 616 Fed.2d 255 (5th Cir 1980), cert. den. (Rehnquist dissenting), supra.

(1) Tullock v. State Highway Comm of Mo., supra, is actually a case involving sovreign immunity (see 507 Fed. 2d at p. 715). The Court in that case did not take up the question of which court had jurisdiction, only that the State agency can be sued. Parden v. Railway of the Ala. St. Dock's Dept. 377 U.S. 184, 12 L.Ed. 2d 233, 84 S.Ct. 1207 (1964), relied on by the Tullock court does not give any additional help, since it, too, deals with the issue of sovreign immunity. In Parden, the Federal statutes deemed controlling explicitly open the doors of the Federal Courts to tort claims involving interstate carriers (see 377 U.S. at p. 185-186). Thus, Tullock does not consider the issue of Federal court jurisdiction as opposed to that of the State courts.

(2) Lewis v. Brinegar, supra did not involve a review of a State agency benefit decision, but of a Fedral agency adoption of

a regulation under the URA. The Court determined that it had jurisdiction because of the Federal Administrative Procedure Act (Title 5 U.S.C. §§ 701-706). Since the Court rendered its opinion in 1974, it could not have considered this Court's decision in Califino v. Sanders 430 U.S. 99, 51 L.Ed.2d 192, 97 S.Ct. 980 (1977) which holds that the Administrative Procedure Act is not an independent grant of subject matter jurisdiction on Federal District Courts. Thus, the logic of Lewis v. Brinegar, supra, does not apply. The remainder of the jurisdiction discussion in that case deals with pendent jurisdiction over state claims which are related to the Federal claim. Since there is, in actuality, no Federal claim made in this case, this later discussion is not applicable.

(3) Beaird-Poulan Div. etc. v. Dept. of Highways, supra, also contains language which might support Federal District Court

jurisdiction in this case. But that language (441 Fed.Supp at p. 869) is no more than a citation of various cases. Those cases are Tullock v. St. Highway Comm'n etc. supra (which is a soverign immunity case); Ledesma v. Urban Renewal Agency of Edinburg 432 Fed.Supp. 564 (S.D. Texas 1977) (which relies totally on application of the Administrative Procedures Act; 432 Fed.Supp. at p. 566); Dawson v. U.S. Dept. of HUD, supra, (which involves a Federal program undertaken by a Federal agency); Moorer v. Dept. of HUD, supra, (to the same effect); Boston v. United States 424 Fed.Supp. 259 (E.D. Mo. 1976) (which does not provide any explanation for its exercise of jurisdiction; 424 Fed.Supp. at p. 266); Seeherman v. Lynn 404 Fed.Supp. 1318 (M.D. Pa. 1975) (which involved a Constitutional question rather than a statutory one); Whitman v. State Highway Comm'n of Mo, 400 Fed.Supp 1040 (W.D. Mo. 1975) (which

has a great deal to say about judicial review generally, but nothing whatever about Federal District Court jurisdiction except its view that the Administrative Procedures Act gives the Court jurisdiction over the Federal defendants); and Lewis v. Brinegar, supra (which also relies on the Administrative Procedure Act).

Thus, the cases which are relevant to the jurisdictional issue do not deal with the question of review of State agency decisions, and do not adequately deal with Title 28 U.S.C. § 1331(a).

They do not change the character of this suit which is a thinly disguised review of a State agency decision which rests precariously on a Federal Statute not directly applied to the State.

V.

ASSUMING PROPER JURISDICTION, THE COURT OF APPEALS ERRED IN ITS REVERSAL OF THE DISTRICT COURT DECISION

A. Introduction

This Court in its unanimous opinion in Berman v. Parker (1954) 348 U.S. 26, 99 L.Ed.27 75 S.Ct. 98, examined the role of redevelopment. The Court made many references to the public welfare involved in redevelopment activities. Among its statements was the following:

> "Miserable and disreputable housing conditions may do more than spread disease and crime and immorality. They may also suffocate the spirit by reducing people who live there to the status of cattle. They may indeed make living an almost insufferable burden. They may also be an ugly sore, a blight on the community which robs it of charm, which makes it a place from which men turn. The misery of housing may despoil a community as an open sewer may ruin a river." (348 U.S. at pp.32-33).

In dealing with these problems, communities have broad discretion. It is

within the province of legislatures ". . . to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully controlled." (348 U.S. at p. 33) This Court also recognized the importance of redesigning blighted areas so as to eliminate the conditions causing such areas, including, inter alia, ". . . outmoded street patterns" so that "a . . . balanced integrated plan could be developed for the region, including . . . streets, and shopping centers." (348 U.S. at 34, 35).

Implicit in all of this is the further responsibility of legislatures to allocate the costs of redevelopment programs. For years, Congress and State Legislatures, in undertaking this responsibility, have followed the common law rule that the relocation expenses of those utilities holding franchises in public streets was to

be borne by the utility rate-payor, unless the legislature determined otherwise. The specific instances of legislated exceptions from this general rule are legion (see Petitioners' Brief herein and argument, infra). As previously explained, the effect of the 4th Circuit opinion in this case would be to reverse this longstanding rule, throwing whole patterns of established legislation into disarray, and immediately taking substantial amounts of money away from housing and other critical needs in order to support the utility or its rate-payors who ought to bear the expense of bringing the utility service to them.

It is within the context of these policies that the merits of this case must be decided; not upon the narrow, definitional basis determined by the Court of Appeals.

Assuming arguendo that the District Court and the Court of Appeals for the

Fourth Circuit had proper jurisdiction, the Court of Appeals erred in ignoring the long-standing and universal rule that private utility companies and the persons benefitting from the utility's services must themselves bear the cost of relocating their facilities under circumstances such as those at bar unless specific statutory authority to the contrary is found.

B. Congress has not abrogated the common law rule

As articulated in the brief of the Petitioner Authority, the District Court and those other courts which have construed the URA with respect to whether a private utility company is a displaced person for purposes of receiving relocation assistance, have applied the common law rule and denied the claims of the utility companies. In Pacific Telephone and Telegraph Company v. Redevelopment Agency of Glendale, supra, the California court correctly stated the rule as follows:

"It is the common law rule, well established in California, that [i]n the absence of a provision to the contrary it has generally been held that a public utility accepts franchise rights in public streets subject to an implied obligation to relocate its facilities therein at its own expense when necessary to make way for a proper governmental use of the streets." (Southern Cal. Gas Co. v. City of L.A., 50 Cal.2d 713, 716, 329 P.2d 289, 290; L.A. County Flood Control Dist. v. Southern Cal. Edison Co., 51 Cal.3d 331, 334, 331 P.2d 1; City of San Pablo v. East Bay Mun. Utility Dist., 75 Cal.App.3d 609, 613, 142 Cal.Rptr. 256; Pacific Tel. & Tel. Co. v. Redevelopment Agency, 75 Cal.App.3d 957, 962, 142 Cal. Rptr. 584.) The vacating of a public street to make way for a redevelopment project to relieve urban blight under the community redevelopment law (Health & Saf. Code, § 33000 et seq.) is a proper governmental use of the streets. (City of San Pablo v. East Bay Mun. Utility Dist., supra, 75 Cal. App.3d at p. 615, 143 Cal.Rptr. 256; Pacific Tel. & Tel. Co. v. Redevelopment Agency, supra, 75 Cal.App. 3d at p. 969, 142 Cal.Rptr. 584.)

The Legislature may provide that the utility be compensated for relocating its facilites (Southern Cal. Gas Co. v. City of L.A. supra, 50 Cal.2d at p. 719, 329 P.2d 289), but "such right

> should not be deemed to have been given unless the Legislature specifically so provides." (Pacific Tel. & Tel. Co. v. Redevelopment Agency, supra, 75 Cal.App.3d at p. 964, 142 Cal.Rptr. at p. 589.)"
>
> 87 Cal.App.3d at 299-300, 151 Cal. Rptr. at 69-70. See Potomac Electric Power Co. v. Fugate, 211 Va. 745, 180 S.E.3d 657 (1971).

There is nothing in the URA, the California Relocation Assistance Act, or the Virginia URA which expressly reverses or modifies the common law rule. "Statutes are not presumed to alter the common law otherwise the act expressly provides." (Saala v. McFarland 63 Cal.2d 124, 130 45 Cal. Rptr. 144, 148 (1965); Estate of Hering 108 Cal.App.3d 88, 92, 166 Cal.Rptr. 298, 300 (1980)).

The Court of Appeals decision in this case ignores the impact of the common law rule, by stating merely that "The Act was intended to create rights that were not recognized at common law." 674 Fed.2d at 300. The Court itself acknowledged that

Congress failed to mention utilities during the debates on the URA and in the legislative history, ibid., but nonetheless found that "the Act was intended to extend benefits uniformly to persons who are are displaced by federal programs. Exclusion of utilities from the Act's coverage would run counter to that purpose." 674 Fed.2d at 300-301.

In light of the common law rule, recognized throughout the country, and the absence of any express provision with respect to utility companies, the Court of Appeals'construction of the statute and its inference of an intention on the part of Congress to create a right which the common law denies is without support.

C. The District Court's decision recognizes the appropriate rule

The Memorandum Opinion of the District Court below relied on the decisions of a number of other federal and state courts which have held under similar factual

situations and under the same state and federal statutory overview, a private utility company is not a displaced person for purposes of receiving relocation assistance. See: Consumer Power Co. v. Costle, 615 Fed.2d 1147 (6th Cir. 1980); Pacific Telephone and Telegraph v. Redevelopment Agency of Glendale, supra, 151 Cal.Rptr. 68, 87 Cal.App. 3d 296; Artesian Water Co. v. State Department of Highways and Transportation, 330 A.2d 432 (Del. 1974); Mountain States Telephone and Telegraph Co. v. Boise Redevelopment Agency, 607 P.2d 1084, 101 Idaho 30 (1980); Public Service of Oklahoma v. Harris, No. 79-C-37-35 (N.D. Okla., Aug. 22, 1980); Lone Star Gas Co. v. Moon Landrieu, No. 80-100-C (E.D. Okla., March 30, 1981). See also: Appalachian Power Co. v. City of Huntington, 210 S.E.2d 471 (W.Va., 1974); So. Union Gas Co. v. City of Artesia, 472 P.2d 368 (N.Mex., 1970); Bristol Tennessee

Housing Authority v. Bristol Gas Co., 407 S.W.2d 681 (Tenn., 1966).

The common factor present in each of the above-cited cases is that the reviewing court applied the common law rule and, finding that the State had not expressly provided for the reimbursement of utility companies for their relocation expenses, denied the claim of a private utility company.

Where the state legislature has, however, expressly required the payment of relocation assistance to private utility companies, courts have approved the claims of such companies. See: City of Columbus v. Indiana Bell Telephone Co., 281 N.E. 2nd 510 (Ind., 1972); City of Center Line v. Michigan Bell Telephone, 182 N.W. 2nd 769 (Mich., 1970).

These cases demonstrate that when the Legislature of a state intends that a utility be reimbursed for its relocation

costs, it will say so in specific and direct language. In California, for example, the Legislature has expressly provided for reimbursement of relocation costs of utility facilities maintained in freeways (Calif. Sts. & Hy. Code, §§ 702, 703), relocations required by the Southern California Rapid Transit District (Calif. Pub. Util. Code §30631), and relocations required by the Reclamation Board in connection with certain flood control projects (Calif. Wat. Code § 8617.5). The California Legislature has not provided for such reimbursement by redevelopment agencies acting pursuant to the California Community Redevelopment Law (Calif. Health and Safety Code §33000 et seq.).

The decision of the Court of Appeals, however, if applied to a California redevelopment agency, would simply disregard these legislative distinctions, and require that California State

redevelopment agencies receiving federal assistance must reimburse private utility companies for their relocation costs, regardless of State law. Such a result was clearly not intended by Congress when it enacted the URA, and lacks any justification, stated or implied, in terms of public policy.

D. Utility relocation costs should be left to the legislature

These amici agree with the California Court of Appeal in Pacific Telephone and Telegraph Co. v. Redevelopment Agency of the City of Glendale, supra, 87 Cal. App.3d at 301, 151 Cal. Rptr. at 70, where the Court stated "Whether the costs of such relocation should be shifted from the utility's rate payers to other taxpayers is a matter of policy for the Legislature to determine." (Citations omitted).

There may indeed be legitimate public purposes to be served by shifting the cost of utility relocations from one population

(e.g., the utility company's customers) to another (e.g., the public). As noted above, in California, the Legislature has found such a purpose when the activity involves freeway construction, mass transportation or flood control. The wholesale application of the Court of Appeals decision, however, would replace any rational legislative distinctions with a literal and unyielding rule.

Funds for the construction of housing for low income families by a redevelopment agency pursuant to the California Community Redevelopment Law, for example, would have to be diverted to pay utility companies for their costs in relocating their power lines or other facilities in connection with such activities, if the project were receiving any federal assistance. The result of such a redirection of scarce funds would be obvious; the amount available for construction of housing for the poor would simply be

reduced by the amount necessary to reimburse the private, profit-making utility companies. It is a legitimate concern of the Legislature to weigh the competing interests of the community and the utility companies, and to decide that the utility companies must pay for the relocation of their facilities under such circumstances. There is no indication that Congress meant to take this discretion away from the States. In fact, Congress itself engaged in a similar specific reimbursement of public utilities in enacting the District of Columbia Public Utilities Reimbursement Act of 1972 (Pub. Law No. 92-495).

Moreover, redevelopment agencies in California have no authority to levy taxes; their primary source of funds is tax increment generated by successful redevelopment projects which result in increased property values. The extent to which a redevelopment agency is capable of transforming blighted

and unproductive areas into areas whose property values may increase would likewise be diminished by syphoning off an agency's funds to a utility company instead of activities otherwise needed for redevelopment. Moreover, the utility companies themselves stand to gain from successful redevelopment. Where once stood blighted property, a redevelopment project can give rise to productive residential and commercial developments, resulting in increased use of utility company services. Yet, the utility companies seek to reap this benefit without cost to them. It is a legitimate exercise of legislative discretion to require the utility companies to share in the burden in light of their potential benefit.

It was improper, therefore, for the Court of Appeals to add this significant burden to a state redevelopment agency in

the absence of any specific legislative requirement.

CONCLUSION

Because the Federal District Court did not have jurisdiction of this case, and because the opinion of the Circuit Court was incorrect, it is respectfully urged that this Court reverse that decision with direction to the District Court to dismiss the case.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

NO. 81-2332

NORFOLK REDEVELOPMENT AND HOUSING AUTHORITY,
Petitioner,

v.

THE CHESAPEAKE AND POTOMAC
TELEPHONE COMPANY OF VIRGINIA,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MOTION OF THE MOUNTAIN STATES TELEPHONE AND TELEGRAPH COMPANY, THE BOISE WATER CORPORATION AND THE IDAHO POWER COMPANY FOR LEAVE TO FILE A BRIEF IN SUPPORT OF RESPONDENT, THE CHESAPEAKE & POTOMAC TELEPHONE COMPANY OF VIRGINIA

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The Mountain States Telephone and Telegraph Company, the Boise Water Corporation and the Idaho Power Company, ("the Idaho Utilities"), by and through their undersigned attorneys, Eberle, Berlin, Kading, Turnbow & Gillespie, Chartered, respectfully move the Court, pursuant to Supreme Court Rule 42, for leave to file the attached Brief as an amicus curiae in support of the Respondent.

In 1971, the Boise Redevelopment Agency ("BRA"), pursuant to a plan of urban renewal adopted by the City of Boise, purchased numerous contiguous lots within the boundaries of the City's urban renewal district. The BRA next petitioned the County Highway District to vacate the streets and alleys abutting its purchases. It then required that all utility lines, poles, pipes and other facilities be removed from the newly vacated streets. The Idaho Utilities initially objected but, upon the condition that their claims under State and Federal statutes, for the costs of relocating their facilities be preserved, agreed to move those facilities so that Boise's entire urban renewal project would not be delayed.

Thereafter, the Idaho Utilities filed suit under both the Idaho Urban Renewal Law of 1965, *Idaho Code* §§50-2001 *et seq.* and the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, 42 USC §4601 *et seq.* ("URA") seeking reimbursement for their relocation costs. The Idaho Supreme Court, in *Mountain States Telephone and Telegraph Company* v. *Boise Redevelopment Agency*, 101 Idaho 30, 607 P.2d 1084 (1980), held that the Idaho Urban Renewal Law allowed, but did not require reimbursement of the Utilities' relocation costs, founding its conclusion upon the common law rule that, in the absence of clear legislation to the contrary, utilities must remove their facilities from public ways at their own expense when so commanded by the sovereign. The Court then remanded the cause for further consideration of the Utilities' claims under the URA.

After a Summary Judgment in favor of the BRA, the matter was again appealed to the Idaho Supreme Court. As framed by the parties, the issue to be addressed by the Idaho Supreme Court in that appeal is whether a public utility is a "displaced person" under the URA and therefore entitled to reimbursement for their costs of removing and relocating their facilities from public rights-of-way as part of a Federally funded urban

renewal project. The issue before the Idaho Supreme Court is therefore identical to that before this Court in the instant proceeding. As a consequence, the Idaho Supreme Court has suspended further proceedings before it, pending the decision of this Court.

The Idaho Utilities recognize that their use of public rights-of-way is permissive under State law, but they do not believe this disqualifies them from being "displaced persons" under the URA. When Federal funds are sought for a State's urban renewal project, the State must first provide adequate assurances, under 42 U.S.C. §4630, to the Federal Government that it will make such relocation payments as the Federal Government would, had the Federal Government undertaken the project itself. Resort to the common law is neither necessary nor appropriate because the URA provides benefits in an area where traditional rules of law had not previously ventured.

Moreover, the Idaho Utilities claim they are "displaced persons", entitled to relocation benefits under the URA under the clear and unqualified language of that statute. The Idaho Utilities therefore have a direct interest in the resolution of the instant proceeding, identical to that of the Respondent. The City of Boise and the BRA have already been granted leave to assert their positions as amicus curiae in support of the Petitioner, and the Idaho Utilities are loathe to permit their arguments to go unanswered.

The Idaho Utilities have sought the consent of the parties to permit their appearance as amicus curiae. Such consent was denied by counsel for Petitioner, necessitating this Motion.

Wherefore, in light of their legitimate interest in the cause before this Court for consideration, the Idaho Utilities respectfully move for leave to file the attached Brief as amicus curiae.

RESPECTFULLY SUBMITTED this 29 day of April, 1983.

EBERLE, BERLIN, KADING,
TURNBOW & GILLESPIE,
CHARTERED

By s/
DALE G. HIGER
Attorneys for Utilities

IN THE

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COME NOW the Mountain States Telephone and Telegraph Company, the Idaho Power Company and the Boise Water Corporation, ("the Idaho Utilities"), by and through their attorneys of record, Eberle, Berlin, Kading, Turnbow & Gillespie, Chartered, Boise, Idaho, and submit this Brief, as amicus curiae, in support of the position of the Chesapeake & Potomac Telephone Company of Virginia, Respondent in the case at bar.

I.

INTEREST OF AMICUS CURIAE

The Idaho Supreme Court has stayed all proceedings in *Mountain States Telephone and Telegraph Company, et al.* v. *Boise Redevelopment Agency*, Case No. 13977, pending the disposition of the instant case. The Idaho Utilities sought reimbursement in that litigation for the costs incurred when they were required to remove and relocate their distribution facilities from vacated public rights-of-way within Boise's urban renewal area.

The City of Boise's urban renewal project is a comprehensive redevelopment project for the core area of the city which is administered by the Boise Redevelopment Agency ("BRA") and largely funded by grants from the Department of Housing & Urban Development. After this Court granted certiorari in the case at bar, the Idaho Supreme Court stayed all proceedings to await the decision of this Court.

In *Norfolk Redevelopment & Housing Authority* v. *The Chesapeake & Potomac Telephone of Virginia*, 674 F.2d 298 (4th Cir., 1982), the Fourth Circuit held that the plain language of the Uniform Relocation Assistance and Real Property Requisition Policies Act, 42 U.S.C. §4601, *et seq.* ("URA"), required payments to utilities which are forced to move their facilities as a result of the acquisition of land by Federally funded projects. The Idaho Utilities believe the decision of the Fourth Circuit is correct. However, a controversy exists due to the conflicting interpretation of the URA reached by the Sixth Circuit in *Consumers Power Company* v. *Costle*, 615 F.2d 1147 (6th Cir., 1980). This Court's decision will resolve the conflict and most likely settle the dispute

before the Idaho Supreme Court. Therefore, the Idaho Utilities' last opportunity to present their position is before this Court, as amicus curiae.

Finally, the financial consequences of this Court's ultimate decision should be mentioned. The BRA received more than $6,000,000.00 in Federal funds to accomplish the Boise redevelopment project. It claims that if it is forced to pay the relocation costs sought by the Idaho Utilities, it will be financially unable to complete that project. Nevertheless, the Idaho Utilities assert that the cost of relocating their facilities should have been built into the BRA's original budgetary framework, or at least anticipated as a definite contingency when the Idaho litigation began in 1974. 42 U.S.C. §4631 specifically requires relocation benefits to be included in the planned cost of a project for which Federal monies are sought.

Given their interest in the action currently before this Court on certiorari, the Idaho Utilities hereby subn.it this Brief as amicus curiae in support of the position of the Respondent.

II.

STATEMENT OF THE CASE

The Idaho Utilities adopt the Statement of the Case as set forth in the Petition for Writ of Certiorari filed by the Norfolk Redevelopment & Housing Authority.

III.

SUMMARY OF ARGUMENT

The URA creates benefits, not new "estates" or "property", and functions simply where there is a cause and effect relationship between the acquisition of land and consequent removal of personal property. Nowhere in the text of the URA is there any distinction or qualification which would exclude public utilities from the generally-defined class of "businesses" entitled to relocation benefits. Commitment to the payment of relocation benefits by State agencies is a pre-

condition to the grant of Federal funds. The common law's prohibition against public utilities acquiring an estate in public streets permissibly occupied by them is therefore irrelevant to whether a person or a business is entitled to receive their benefits. The URA requires a State agency to act as the Federal Government would if it were carrying out the project in question, and the Federal Government has no inherent power to order utilities to remove their equipment, without compensation, from streets they occupy at the pleasure of the State Government.

IV.

ARGUMENT

THE FOURTH CIRCUIT PROPERLY APPLIED THE UNAMBIGUOUS LANGUAGE OF THE UNIFORM RELOCATION ACT, 32 U.S.C. §4601 ET SEQ.

In *Mountain States Telephone and Telegraph Company et al.* v. *Boise Redevelopment Agency*, 101 Idaho 30, 607 P.2d 1084 (1980), the Idaho Supreme Court determined that the BRA is, under *I.C.* §50-2006(a), "an independent public body corporate and politic . . .", upon which the State had conferred a measure of its police power. See also, *BRA* v. *Yick Kong Corporation*, 94 Idaho 876, 499 P.2d 575 (1972). The BRA is, therefore, a "State agency" within the meaning of the URA. 42 U.S.C. §4601(3).

The BRA acquired title to various contiguous parcels of real property in the city and then petitioned the County Highway District to vacate the abutting streets and alleys. Upon such vacation, the BRA acquired the land underlying the adjacent streets and alleys up to the centerline thereof. See *Mochel* v. *Cleveland*, 51 Idaho 468, 5 P.2d 549 (1930); *Shaw* v. *Johnson*, 17 Idaho 678, 107 Pac. 399 (1910); *I.C.* §50-311. The BRA thereupon ordered the Idaho Utilities to remove their equipment from the newly vacated streets.

The Idaho Utilities are all "public utilities" within the definition of *I.C.* §61-129. Mountain States Telephone & Telegraph Company had placed its lines on the public streets pursuant to *Idaho Code* §62-701 and Article XI, §13 of the Idaho Constitution. Idaho Power Company had used the pub-

lic streets for its electrical transmission facilities under the sanction of *I.C.* §62-705 and under franchise agreements with the City of Boise. The Boise Water Corporation had occupied the public streets by virture of *Idaho Code* §§30-802 and 40-305 and franchise agreements with the City of Boise.

In the case at bar, in virtually identical circumstances, the Fourth Circuit applied the unambiguous language of the URA and held that the Respondent utility was entitled to relocation benefits under 42 U.S.C. §4622.

To qualify for relocation benefits under the URA, a party must be a "displaced person", which is defined as "any person who . . . moves . . . as a result of the acquisition of . . . real property . . . or a program or project undertaken by a Federal agency, or with Federal financial assistance . . ." 42 U.S.C §4601(b). §4601(b) further defines a "displaced person" as a person required to vacate real property "on which such person conducts a business or farm operation." "Person" is defined as "any individual, partnership, corporation or association." 42 U.S.C. §4601(5). "Business", is defined in §4601(7) as "any lawful activity . . . conducted primarily (A) for the purchase, sale, lease, and rental of personal and real property and for the manufacture, processing, or marketing of products, commodities, or any other personal property; [or] (B) for the sale of services to the public." Nothing in the URA contains the slightest hint that this last definition contemplates any limitation on the size of a "business" entitled to relocation benefits, or as to the nature of its endeavor, apart from what is explicitly set forth in 42 U.S.C. §4601(7).

The Idaho Utilities are "businesses" which have been required to remove their personal property "as the result of" the acquisition of the real property by the BRA. As the Fourth Circuit noted below:

> ". . . It is this Court's duty to apply the literal reading of the statute. Doing so, we find that a utility comes within the Act's definition of 'business' and thus is a 'displaced person' under the Act." 674 F.2d at 301.

Indeed, the Petitioner herein concedes, in page 24 of its Brief, that the Respondent would be a "displaced person"

entitled to relocation benefits if, for example, "an office building it owned or leased . . . was being acquired under a Federal of Federally assisted project." It is difficult to reconcile Petitioner's extensive discussion of how the URA is a "people oriented" measure which implicitly excludes large, publicly regulated businesses such as Respondent and the Idaho Utilities, with this concession.

Under 42 U.S.C. §4622(a), relocation benefits must be paid for the removal of personal property. Petitioner argues that the utility transmission lines and other facilities are real rather than personal property. Under the regulations of the Department of Housing & Urban Development, 24 C.F.R. §42.40(m)(2), reference must be made to State law to determine the character of property. In Idaho, and generally, utility equipment is classified as personal property. 1 Thompson on Real Property §80; Pond, Public Utilities (3d Ed.) §472; *Mountain States Telephone and Telegraph Company* v. *Kelly*, 93 Idaho 226, 459 P.2d 349 (1969). *Newport Illuminating Company* v. *Tax Assessors*, 36 A. 426 (R.I., 1896); *Portland* v. *New England Telephone and Telegraph Company*, 68 A. 1040 (Me., 1907); *Rudolph* v. *Potomac Electric Power Company*, 24 F.2d 882 (D.C. Cir., 1928); *Connecticut Light and Power Company* v. *Town of Oxford*, 126 A. 1 (Conn., 1924). Moreover, under the principles announced by the Idaho Supreme Court in *Mountain States Telephone and Telegraph* v. *BRA, supra*, a utility which places its equipment on public rights-of-way necessarily does so with the knowledge that such occupation will always be at the pleasure of the State. Thus, the intent to permanently affix the equipment to the realty — the primary test to distinguish realty from personalty — cannot exist. *Bangor-Hydro Electric* v. *Johnson*, 226 A.2d 371, (Me., 1967); *Kane* v. *Timm*, 527 P.2d 480 (Wash., 1974); *Boise Payette Lumber Co.* v. *McCormick*, 32 Idaho 462, 186 P. 252 (1919); 2 Tiffany, *Real Property* (3d Ed.) §607; 34 Cal.Jur (3d Ed.) *Fixtures*, §5.

Second, the Redevelopment Agencies argue that the removal of the facilities was not occasioned by their acquisition of real property, but by the command of independent public bodies (such as the Ada County Highway District) having no direct interest in the redevelopment plan. A similar argument was made below and rejected by the Fourth Circuit:

> "While in a very technical sense, it may have been the city [the County Highway District] that closed the streets, the city was acting at the request of HUD and the [Redevelopment Agency]." 674 F.2d at 301.

See also, *Mountain States Telephone and Telegraph Company* v. *Boise Redevelopment Agency, supra,* at 607 P.2d 1088, 1089, fn. 3.

Moreover, the URA specifies only that the removal of personalty have occurred as a "result" of the acquisition of real property: it proposes a simple cause-and-effect relationship, and avoids formalisms which would prevent it from ameliorating the general burden of displacement inherent in large-scale urban renewal projects.

One need not delve into the URA's legislative history to find its purpose, because that is plainly stated at 42 U.S.C. §4621:

> "The purpose of this title [42 U.S.C. §§4621-4638] is to establish a *uniform policy* for the fair and equitable treatment of persons displaced as a result of Federal and federally oriented programs in order that such persons shall not suffer disproportionate injuries as a result of programs designed to benefit the public as a whole." (Emphasis provided)

See also, *Alexander* v. *United States Department of Housing & Urban Redevelopment,* 441 U.S. 39, 99 S.Ct. 1572, 68 L.Ed.2d 28 (1979).

The essence of URA lies in its uniform application granting benefits to any "person" who is displaced by a Federally financed State acquisition of real property for urban renewal projects. The exclusion of utilities would run counter to this purpose.

Legislative histories are often helpful in interpreting acts of Congress. See eg. *NLRB* v. *Amax Coal Company,* 453 U.S. 322, 101 S.Ct. 2789, 69 L.Ed.2d 672 (1981); *Watt* v. *Alaska,* 451 U.S. 259, 101 S.Ct. 1673, 68 L.Ed.2d 80 (1981). However, such histories should be referred to only when, first, the disputed

statute is so ambiguous and lacking a plain meaning, that resort to them is necessary to resolve conflicting interpretations. Second, the legislative histories themselves must provide clear-cut guidance for the resolution of the ambiguity. The URA is an unambiguous piece of legislation whose clearly stated purpose fully comprehends payment of benefits to public utilities. See *Louisiana Department of Highways* v. *Coleman*, 444 F.Supp. 151 (D.La., 1978).

The quoted histories say nothing about *excluding* anyone at all from the URA's reach; if anything, the debates are framed, like the Act itself, in the most expansive and inclusive terms. Resort to the legislative histories is neither necessary nor requires any different construction.

The starting point for interpreting a statute is always the language of the statute itself, and, if clearly expressed, that language will ordinarily be conclusive. *Consumers Products Safety Commission* v. *GTE Sylvania*, 447 U.S. 102, 100 S.Ct. 2051, 64 L.Ed.2d 766 (1980), *U.S.* v. *Turkette*, 452 U.S. 576, 101 S.Ct. 2524, 69 L.Ed.2d 246 (1981); *Maine* v. *Thiboutot*, 448 U.S. 1, 100 S.Ct. 2502, 65 L.Ed.2d 555 (1980).

THE LEGISLATIVE HISTORY OF THE URA NEED NOT BE REFERRED TO NOR DOES IT EXCLUDE UTILITIES FROM THE DEFINITION "DISPLACED PERSONS."

Petitioner and those amicus curiae aligned with it have placed untoward reliance on ambiguous legislative histories in attempting to find a Congressional intent to exclude public utilities from the URA's benefits. They cite House Report No. 91-1656, U.S. Code Cong. and Admin. News 1970, p. 5850, and other sweeping pronouncements from the Congressional floor, to characterize the URA as a "people-oriented" bill whose intent is to provide relocation benefits solely to families, individuals and "small" businesses. No such limitation appears anywhere in the URA, itself.

If Congress intended the URA to be limited to "people", then it would not have included partnerships, corporations and other associations in the definition of "persons". It is suggested that the URA's reference to "businesses" is somehow

intended to apply only to the small entrepreneur. But, the URA contains no limitation at all on the size of a business entitled to relocation benefits. In any event, such a vague and subjective limitation would be difficult if not impossible to administer.

THE COMMON LAW OF A STATE IS IRRELEVANT TO A PARTY'S ENTITLEMENT TO RELOCATION BENEFITS UNDER THE URA

At common law, public utilities do not acquire any estate or property right by virtue of their permissive use of public rights-of-way; rather, the utilities merely hold a license to use of a right-of-way, revocable by the State when public need so requires. *Mountain States Telephone and Telegraph Co.* v. *BRA, supra; State* v. *Idaho Power Company*, 81 Idaho 487, 346 P.2d 596 (1959). Because no "property" is "taken", public utilities are not entitled to just compensation pursuant to the Fifth Amendment of the Constitution or under State eminent domain statutes when they are required to move their equipment. But, these common law principles, on which Petitioner and the Sixth Circuit in *Consumer's Power Company* v. *Costele, supra*, rely, are irrelevant to any consideration of how benefits are dispensed under the URA. The Idaho Utilities believe that much of Petitioner's error can be attributed to careless usage of the term "right". As Petitioner uses it, the word "right" refers principally to property rights and estates. But as the term is used by Respondent and by the Idaho Utilities, it is applicable simply to the "right" or ability of a displaced person to claim a benefit; there is no necessity to first require the existence of a "property right" before a public utility, or any other "displaced person", has a "right" to a benefit created solely by the URA. The URA itself, specifically provides that it does not create any "rights or liabilities" with respect to the acquisition of real property under 42 U.S.C. §4651 or in any eminent domain proceeding. 42 U.S.C. §4602. But the URA does not place any similar qualification upon the relocation *benefits* which Federal and State agencies are required to dispense to persons displaced "as a result of" the acquisition of real property.

> "Because of the fundamental differences between 'damages' which he [displaced person]

> may recover under the eminent domain law and the 'benefits' to which he may be entitled under the relocation assistance law, and between the distinct judicial remedies involved, a displacee's claim for relocation benefits and eminent domain damages must be adjudicated in separate trials." *City of Mountainview* v. *Superior Court, County of Santa Clara*, 126 Cal.Rpt. 358, 361 (1975).

See also, 1 National Cooperative Highway Research Program, Selected Studies in Highway Law, pp. 72, 102.

The price actually paid to a voluntary seller of land or the compensation awarded a condemnee, is irrelevant; what is pivotal is the fact that a purely causal relationship links the acquisition of land, on the one hand, to the removal of personal property, on the other. Indeed, this Court has found "displaced persons" entitled to relocation benefits where there was no actual acquisition of land at all, just so long as those persons removed their property in good faith and upon the genuine belief that the property they occupied was about to be acquired for a Federally financed project. *Alexander* v. *Department of Housing & Urban Development, supra.* Nor does the URA require that "displaced person's" personal property have actually occupied the land acquired. 42 U.S.C. §4601(6). *Beaird-Poulan* v. *Department of Highways*, 441 F.Supp. 866 (W.D. La., 1977), aff'd 616 F.2d 255 (5th Cir., 1980); *Messer* v. *Virgin Islands Urban Renewal Board*, 623 F.2d 303 (3d Cir., 1980).

Petitioner and the amicus curiae aligned with it, would require that a claimant own a legal estate in the real property acquired by the Federally funded project before it is entitled to URA benefits. In support of this argument, the agencies cite *Consumers Power Company* v. *Costle*, 468 F.Supp. 375 (D. Mich., 1979), aff'd, 615 F.2d 1147 (6th Cir., 1980), two unreported District Court cases, *Public Service Company of Oklahoma* v. *Harris*, unreported No. 79-C-37BT (N.D., Okla., 1980) and *Lone Star Gas Company* v. *Landrieu*, unreported No. 80-100-C (E.D., Okla., 1981), and a Student Note, *Displaced Persons and the Uniform Relocation Act: A Proposed Methodolgy for Rewarding Benefits*, 58 Boston U.L.Rev. 596 (1978). None

of these authorities provide any authority for their pivotal finding that URA benefits depend upon the pre-existence and taking of an estate vested in a utility-claimant and cognizable under the Fifth Amendment. Moreover, 42 U.S.C. §4602(b) states that nothing in the URA shall confer any new right "in any condemnation proceeding brought under the power of eminent domain . . ." This provision is incompatible with the theory that the URA provides relocation benefits only where there has been a direct taking of a displaced person's legal estate.

BECAUSE THE URA DEFINES RELOCATION BENEFITS AND A PARTY'S ENTITLEMENT THERETO IN TERMS OF FEDERAL POWERS, REFERENCE NEED NOT BE MADE TO A STATE'S COMMON LAW

The URA provides a second ground to support the decision of the Fourth Circuit in the case at bar, and to demonstrate that the common law's prohibition against the acquisition of estates in public rights-of-way by utilities occupying the same under statutory grant cannot be relied upon to support the denial of relocation benefits claimed by Respondent.

42 U.S.C. §4630 requires a State agency contemplating a project requiring Federal funds to first give the Federal Government "satisfactory assurances" that fair and reasonable relocation assistance payments would be provided to or for displaced persons, *as are required to be provided by the Federal agency under §§202, 203* and *204* [42 U.S.C. §§4622-4624] . . ." (emphasis provided). This provision is the key to reconciling the URA and the common law rule obligating utilities to bear their own relocation expenses.

> ". . . [T]he legal duty created by §201 [42 U.S.C. §4630] falls on the 'head of a Federal agency,' rather than on State agencies directly. But it is equally clear, we think, that to receive Federal aid, state agencies . . . must give assurances that relocation assistance will be made available and, in accepting Federal aid, they incur an obligation to carry such assurances out."
>
> *Jones* v. *District of Columbia Redevelopment Land Agency,* 499 F.2d 502, 508 (D.C. Cir., 1974).

"Moreover, by accepting the responsibility of administering relocation benefits under the Federal statutes, the State has subjected itself to the same obligations as the Federal government and thus has consented to be sued [cite]."

Tullock v. *State Highway Commission of Missouri*, 507 F.2d 712, 715 (8th Cir., 1974).

"Full justice will be done by ordering the BRA to comply with the Federal law, if it becomes apparent that it has not done so."

Mountain States Telephone & Telegraph Company et al. v. *Boise Redevelopment Agency, supra*, at 607 P.2d 1091.

"If it were established prior to the Federal funds being paid to the [H]ighway Commission under the agreement, that the required assurances had not been secured, the remedy would be to prohibit the Federal defendants from releasing such funds to the Commission. In this case, as most of the funds have been paid over to the Commission under the right-of-way agreement, their remedy would only result in a small percentage of the funds being withheld. In such circumstances, where substantially all of the funds have been paid to the State agency involved and the project has been on-going under the agreement, a proper remedy is to direct the State agency using such funds to comply with the URA [cite]. In such circumstances it is too late for the State to withdraw from a project and return the Federal funds [cite]."

Whitman v. *State Highway Commission of Missouri*, at 400 F.Supp. 1068, fn. 35.

See also *Goolsby* v. *Blumenthal*, 581 F.2d 455, (5th Cir., 1978), reversed on other grounds, 590 F.2d 1369 (5th Cir., 1979).

The matter should be considered in the context of the dual sovereignty which lies at the heart of our Federal system.

The URA is not merely the urban renewal statutes or common law of a given State writ large, but is, instead, the pronouncement of a sovereign whose powers and abilities are very different from those of the State sovereign which originally conferred the privilege to use the public streets upon public utilities.

> "The laws of the United States are the laws of several States, and just as much binding on the citizens and courts thereof as the State laws are. The United States is not a foreign sovereignty as regards to the several States, but is a concurrent and, within its jurisdiction, paramount sovereignty. Every citizen of a State is a subject of two distinct sovereignties, having concurrent jurisdiction in the State; concurrent as to place and persons, though distinct as to subject matter."
>
> *Claflin* v. *Houseman*, 3 Otto 130, 23 L.Ed. 833, 838 (1876).

See also, the Tenth Amendment to the Constitution of the United States; James Madison, Federalist Paper No. 45; *Butte* v. *Illinois*, 33 U.S. 640, 68 S.Ct. 763, 92 L.Ed. 986 (1947); *Hoke* v. *U.S.*, 272 U.S. 308, 33 S.Ct. 281, 57 L.Ed. 523 (1912); *Railroad Company* v. *Fuller*, 84 U.S. 560, 21 L.Ed. 710 (1873); 16 Am.Jur.2d Constitutional Law §277 *et seq.*; 72 Am.Jur.2d, States, Territories and Dependencies, §16.

In the separation of powers and creation of the two sovereignties which accompanied the ratification of the Constitution, the several States retained full control over the public highways located within their respective borders.

> "The original source of power over both streets and highways is the State. But this power of control is generally delegated in some form to the municipalities and county authorities of the State."

Owensboro v. *Cumberland Telephone & Telegraph*, 230 U.S. 58, 33 S.Ct. 988, 57 L.Ed. 1389, 1394 (1913).

See also, 39 Am.Jur.2d Highways & Bridges, §§199, 200; *Teachers Insurance & Annuity Association of America* v. *City of Wichita*, 559 P.2d 347 (Kan., 1977); *Peden* v. *City of Seattle*, 510 P.2d 1169 (Wash., 1973); *Packard* v. *O'Neil*, 45 Idaho 427, 262 P.2d 881 (1927). Even the Federal Government's aid in the construction of a State's highways does not detract from the power of the State to control, regulate and maintain them. 39 Am.Jur.2d Highways, Streets & Bridges §201.

Because the State grants permission to use the highways to utilities, it may also withdraw it. *Artesian Water Company* v. *State Department of Highways & Transportation*, 330 A.2d 432 (Del., 1974); *Lehman* v. *Williamson*, 533 P.2d 63 (Colo., 1975); *Matter of Daben Corporation*, 469 F.Supp. 135 (Puerto Rico, 1979); *DeHaro* v. *U.S.*, 5 Wall, 599, 18 L.Ed 681 (1866); *Mountain States Telephone and Telegraph, et al.* v. *Boise Redevelopment Agency, supra; State* v. *Idaho Power Company, supra;* 1A Thompson on Real Property §§216, 224; 51 Am.Jur.2d Licenses & Permits §58. The State of Idaho having conferred the privilege, it lies with the State of Idaho and its subdivisions to withdraw it.

But the URA required the BRA and Petitioner to act as the Federal Government would as a pre-condition to receiving Federal assistance for urban renewal work, and the Federal Government would be powerless to confer or withdraw the privilege of gratuitous use of public streets. The question of the powers of "State agencies" under the common law is therefore secondary to the question of the Federal Government's powers, vis-a-vis the Idaho Utilities and Respondent.

This is consistent with the use of discretionary, rather than mandatory language in the Idaho Urban Renewal Law, and specifically I.C. §50-2007(h) and §50-2018(j)(3). *Mountain States Telephone and Telegraph Company* v. *Boise Redevelopment Agency, supra*, at 607 P.2d 1088, 1089. When read alongside the URA it becomes apparent that the Idaho Legislature anticipated that the Federal Government would require a

commitment to make relocation payments as a pre-condition to obtaining Federal project monies, but it did not wish to obligate local urban renewal agencies to make these payments in every other instance.

Petitioner supports its position by referring to the District of Columbia Public Utilities Reimbursement Act of 1972, P.L. No. 92-495, 86 Stat. 812 (1972). That law specifically permits the payment of relocation costs for public utilities. Petitioner's reasoning is that if the URA should be read as broadly as Respondent and the Idaho Utilities contend, there would have hardly been any necessity for Congress to restate the entitlement of public utilities to relocation costs in this other, specific statute. That argument is insupportable, first because the cited statute allows relocation costs for the relocation, replacement or removal of "all real and personal property," so relocated, "as the result of urban redevelopment . . ." District of Columbia Public Utilities Reimbursement Act, *supra*, §1(c), (d)(2). More importantly, the statute cited by Petitioner is, if anything, the exception which proves the validity of the Idaho Utilities' position. The Idaho Utilities contend that the Federal Government has no inherent power to require utilities to remove their facilities, and that when State agencies accept Federal monies under the URA, they are obligated to be similarly constrained. But in the District of Columbia, the Federal Government is, in fact, the sovereign; Congress occupies the same position with respect to the District of Columbia as do the State Legislaturers over the affairs of their respective States. *Palmore* v. *U.S.*, 411 U.S. 389, 935 S.Ct. 670, 36 L.Ed.2d 342 (1973); *District of Columbia* v. *John R. Thompson Co.*, 346 U.S. 100, 73 S.Ct. 1007, 97 L.Ed. 1480 (1953); *Traction Company* v. *Hof*, 174 U.S. 1, 19 S.Ct. 580, 43 L.Ed. 873 (1899). Thus, within the District of Columbia, the Federal Government was the sovereign who ultimately conveyed the privilege to public utilities to occupy streets, and, consequently, was the sovereign who could withdraw that privilege; when thusly viewed, the District of Columbia Public Utilities Reimbursement Act, *supra*, becomes fully consistent with the URA.

Absent specific Constitutional prohibition, the Federal Government may condition a grant of monies in any way it sees

fit; if a State which desires the grant cannot or refuses to comply with the conditions, then it is not entitled to receive it.

> "Also beyond challenge is the power of the Federal Government to impose reasonable conditions on the use of Federal funds, Federal property and Federal privileges [cites]. The lesson of these cases is that the Federal Government may establish and impose reasonable conditions relevant to Federal interest in the project and to the over-all objectives thereof. Conversely, a State cannot compel use of Federal property on terms other than those prescribed or authorized by Congress [cite]. Article VI of the Constitution, of course, forbids State encroachment on the supremacy of Federal Legislative action."
>
> *Ivanhoe Irrigation District* v. *McCracken*, 357 U.S. 275, 78 S.Ct. 1174, 2 L.Ed. 1313, 1327 (1958).

See also, *King* v. *Smith*, 392 U.S. 309, 88 S.Ct. 2128, 20 L.Ed.2d 1118, 1134, fn. 34 (1968); *Federal Power Commission* v. *Idaho Power Company*, 344 U.S. 17, 73 S.Ct. 85, 98 L.Ed. 15 (1952).

The BRA and Petitioner accepted their Federal grants with the explicit understanding that their respective programs would include the payment of such relocation benefits as the Federal Government would have been obligated to make if it had been the administering agency. What these two State agencies might have been able to do if their respective projects had been carried out exclusively within the framework of State common law and State finances is beside the point. See, for example, *Pacific Telephone and Telegraph Company* v. *Redevelopment Agency of the City of Glendale*, 151 Cal.Rptr. 68 (1978).

CONCLUSION

The Fourth Circuit, in the instant Appeal, was correct in reading the URA in a straightforward fashion. The unambiguous wording of the Act permits nothing else. To make the

distinctions drawn by the Sixth Circuit in *Consumers Power Company* v. *Costele, supra*, and by the Petitioner and the amicus curiae aligned with it herein, one must begin, as they have, by ignoring the text of the Act and going immediately to fragmentary exerpts from Congressional debates. There, they find exceptions to the Act founded purely on implication. Petitioner's references to the common law of the individual States, which are equally absent from the Act, are not even founded upon this equivocal ground.

By contrast, Respondent and the Idaho Utilities are able to carry out their argument completely within the confines of the URA; they find no necessity to go beyond its text. That text provides an internally consistent scheme for the payment of relocation benefits to all parties displaced by Federally funded projects, irrespective of whether such projects are actually administered by the Federal Government or by the various States.

The URA is a statute of the broadest application. The common law cannot operate to restrict that application because, first, the benefits conferred by that statute were created out of whole cloth by the Congress; they are independent of and distinct from the just compensation which the Fifth Amendment to the Constitution requires when "private property . . . [is] . . . taken for public use . . ." Secondly, when the Petitioner accepted its Federal grant, it agreed to act as the Federal Government would under the URA, insofar as the payment of relocation benefits is concerned; because the Federal Government was not the sovereign which conveyed the privilege to occupy public streets to Respondent and the Idaho Utilities, it could hardly withdraw that privilege, and Petitioner is now similarly constrained. For these reasons, the decision of the Fourth Circuit, below, should be affirmed.

RESPECTFULLY SUBMITTED this 29 day of April, 1983.

EBERLE, BERLIN, KADING,
TURNBOW & GILLESPIE,
CHARTERED

By s/
DALE G. HIGER
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CERTIFICATE OF MAILING

I hereby certify that on this 29 day of April, 1983, I caused to be mailed a true and correct copy of the above and foregoing MOTION OF THE MOUNTAIN STATES TELEPHONE AND TELEGRAPH COMPANY, THE BOISE WATER CORPORATION AND THE IDAHO POWER COMPANY FOR LEAVE TO FILE A BRIEF IN SUPPORT OF RESPONDENT, THE CHESAPEAKE & POTOMAC TELEPHONE COMPANY OF VIRGINIA, and BRIEF OF THE AMICUS CURIAE, by regular, first class United States Mail, with postage prepaid, addressed as follows:

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APR 2 1983

No. 81-2332

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

NORFOLK REDEVELOPMENT AND HOUSING AUTHORITY,

Petitioner,

v.

THE CHESAPEAKE AND POTOMAC TELEPHONE COMPANY OF VIRGINIA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MOTION FOR LEAVE TO FILE, AND BRIEF AMICUS CURIAE OF THE NATIONAL INSTITUTE OF MUNICIPAL LAW OFFICERS IN SUPPORT OF PETITIONER, NORFOLK REDEVELOPMENT AND HOUSING AUTHORITY

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April 1983

IN THE

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OCTOBER TERM, 1982

No. 81-2332

NORFOLK REDEVELOPMENT AND HOUSING AUTHORITY,

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THE CHESAPEAKE AND POTOMAC TELEPHONE COMPANY OF VIRGINIA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE

The National Institute of Municipal Law Officers [NIMLO] moves the Court for leave to file the attached brief as amicus curiae in support of the Petitioner, Norfolk Redevelopment and Housing Authority. The petitioner has consented to the filing of the brief, but the respondent has withheld consent. These letters granting and withholding consent, respectively, have been lodged with the Clerk.

NIMLO submits that its brief can assist the Court in determining whether state rules and regulatory procedures governing the relationship between utility companies and

local governmental entities have been nullified, in the context of federally funded projects, by Congress in enacting the Uniform Relocation Assistance and Real Property Acquisitions Policies Act of 1970, 42 U.S.C. §§ 4601 *et seq.* (1976). NIMLO's interest in this issue is set out in the Interest of the Amicus Curiae section of the attached brief. The brief analyzes the development and status of state common law rules defining the responsibilities of utility companies that, with the permission of state and local governments, occupy and use public rights-of-way in the conduct of their business. It also considers the nature of the interests involved in the provision of relocation assistance pursuant to the federal statute and the fiscal concerns of local governments, which must make difficult decisions in promoting the public health and welfare.

Because of the widespread adoption of legislation conforming with the Uniform Relocation Act, and the general reliance on a state rule that utilities are responsible for their own costs in relocation, this case is of nationwide importance, and, we submit, the attached amicus brief will assist the Court in evaluating the national impact of the decision in this case.

The motion and the brief *amicus curiae* are signed by the officers and trustees of NIMLO, as the authorized legal counsel of their governments and, pursuant to NIMLO's Constitution, in their capacities as representatives of the NIMLO membership. We urge the Court to grant NIMLO leave to file the attached brief as amicus curiae.

Respectfully submitted,

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TABLE OF CONTENTS

Page

INTEREST OF THE AMICUS CURIAE 1

STATEMENT OF THE CASE 3

SUMMARY OF ARGUMENT 3

ARGUMENT 4

I. BECAUSE OF THEIR UNIQUE NATURE, UTILITIES MAY BE SUBJECT TO SPECIAL STATE COMMON LAW RULES AND REGULATORY PROCEDURES, WHICH ARE TO BE DEEMED APPLICABLE UNLESS MODIFIED BY CONTRACT OR EXPRESS LEGISLATIVE ACTION 5

A. Common law mandates that respondent, C & P Telephone Company, pay its own costs for relocation of its facilities from public rights-of-way 5

B. The ratemaking process is a sufficient and preferable means through which utilities may be allowed to recover extraordinary expenses for relocation 8

C. A determination that state law and regulations should be modified may be accomplished only through contract with or other clear action by an appropriate legislative authority 10

II. THERE HAS BEEN NO LEGISLATIVE ACTION THAT EXPRESSLY OR IMPLIEDLY ABROGATES THE COMMON LAW RULES AND CONTRACT PROVISIONS GOVERNING THE RELATIONSHIPS AMONG THE PARTIES, CITY AND H.U.D. IN THIS CASE, OR THAT WOULD SUPPORT THE IMPOSITION OF SIGNIFICANT FINANCIAL BURDENS ON LOCAL GOVERNMENTS NATIONWIDE 11

Page

A. Congress has not expressed an intention to impose the extraordinary costs of utility relocations on states and their political subdivisions 12

B. Subsequent congressional actions and policy reasons are contraindicative to the extension of relocation benefits to utility companies 15

CONCLUSION 18

APPENDIX, SUMMARY OF NIMLO MEMBERSHIP SURVEY 1a

TABLE OF AUTHORITIES

Cases: **Page**

Artesian Water Co. v. State Dept. of Highways & Transportation, 330 A.2d 432 (Super. Ct.), *affirmed as modified*, 330 A.2d 441 (Del. 1974) 15, 16

Chesapeake and Potomac Telephone Co. of Virginia v. Landrieu, 674 F.2d 298 (4th Cir. 1982) 12

Commonwealth v. VEPCO, 211 Va. 758, 180 S.E.2d 675 (1971) 8

Connecticut Railway and Lighting Co. v. New Britain Redevelopment Comm'n, 161 Conn. 234, 287 A.2d 362 (1971) 6

Consumers Power Co. v. Costle, 615 F.2d 1147 (6th Cir. 1980) 8, 12

Creative Displays, Inc. v. South Carolina Highway Dept., 272 S.C. 68, 248 S.E.2d 916 (1978) 15

Fairfax's Devisee v. Hunter's Lessee, 11 U.S. (7 Cranch) 603 (1812) 13

Michigan Bell Telephone Co. v. City of Detroit, 106 Mich. App. 690, 308 N.W.2d 608 (1981) 6

Minnesota Gas Co. v. Public Services Comm'n, 523 F.2d 581 (8th Cir. 1975), *cert. denied*, 424 U.S. 915 (1976) 9

Mountain States Telephone and Telegraph Co. v. Boise Redevelopment Agency, 101 Idaho 30, 607 P.2d 1084 (1980) 5, 6

National League of Cities v. Usery, 426 U.S. 833 (1976) 2

Page

New Orleans Gaslight Co. v. Drainage Comm'n of New Orleans, 197 U.S. 453 (1905) 7

Newport Electric Corp. v. Redevelopment Agency of Newport, 116 R.I. 22, 351 A.2d 590 (1976) 11

Pacific Telephone and Telegraph Co. v. Redevelopment Agency, 75 Cal. App.3d 957, 142 Cal. Rptr. 584 (1977) 6

Pacific Telephone and Telegraph Co. v. Redevelopment Agency of Glendale, 87 Cal. App.3d 296, 151 Cal. Rptr. 68 (1978) 10

Pennhurst State School and Hospital v. Halderman, 451 U.S. 1 (1981) 13, 14

Potomac Electric Power Co. v. Fugate, 211 Va. 745, 180 S.E.2d 657 (1971) 7

Rizzo v. Goode, 423 U.S. 362 (1976) 2

Robert C. Herd & Co., Inc. v. Krawill Machinery Corp., 359 U.S. 297 (1959) 13

Shaw v. Merchants' National Bank of St. Louis, 101 U.S. 557 (1880) 13

Shepard v. Dept. of Community Corrections, 293 Or. 191, 646 P.2d 1322 (1982) 17

Tennyson v. Gas Service Co., 506 F.2d 1135 (10th Cir. 1974) 9

Union Electric Co. v. Land Clearance for Redevelopment Authority of St. Louis, 555 S.W.2d 29 (Mo. 1977) 7

Western Union Telegraph Co. v. Tarrant County, 450 S.W.2d 763 (Tex. Civ. App. 1970) 7

Statutes: **Page**

District of Columbia Public Utilities Reimbursement Act of 1972, Pub. L. 92-495, 86 Stat. 812 (Oct. 14, 1972) 17

Federal-Aid Highway Act of 1958, 23 U.S.C. § 123 (1976) 15

Johnson Act, 28 U.S.C. § 1342 (1976) 9

Uniform Relocation Assistance and Real Property Acquisitions Policies Act of 1970, 42 U.S.C. §§ 4601 *et seq.* (1976) ..... *passim*

§ 4602 12

§ 4621 11

VIRGINIA CODE:
§ 36-55. 25 (1982) 6

§§ 56-234,-235 (1950) 8

§ 56-458 (1950) 7

§ 56-460 (1950) 7

Miscellaneous:

115 Congressional Record 31,553 (1969) (statement of Sen. Muskie) 10

H. Rep. 91-1656, reprinted in 1970 U.S. Code Cong. & Ad. News 5850 12

International City Management Assoc., The Municipal Year Book 1982 (1982) 15

12 McQuillin, Municipal Corporations (3d ed. 1970) 5

Page

J. Moore, W. Taggart, A. Vestal & J. Wicker, Moore's Federal Practice (1982) 9

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Schell and Sparks, "Public Participation in the Regulation of Utilities by the Virginia State Corporation Commission: How the Commission Makes Public Policy While It Makes Rates," 18 Wm. & Mary L. Rev. 73 (1976) 8, 9

Sipes and McCoid, "Recovery of Consequential Damages in Eminent Domain," 48 Va. L. Rev. 437 (1962) 12

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

No. 81-2332

NORFOLK REDEVELOPMENT AND HOUSING AUTHORITY,

Petitioner,

v.

THE CHESAPEAKE AND POTOMAC TELEPHONE COMPANY OF VIRGINIA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF OF THE NATIONAL INSTITUTE OF MUNICIPAL LAW OFFICERS AS AMICUS CURIAE

INTEREST OF THE AMICUS CURIAE

This brief *amicus curiae* is filed pursuant to Rule 36 on behalf of the more than 1600 local governments, or political subdivisions of states, that are members of the National Institute of Municipal Law Officers [NIMLO]. These member local governments operate NIMLO through their chief legal officers, variously called city or county attorney, corporation counsel, city solicitor or law director and other titles, with each member local government having one vote on all actions which are cast by the organization.

Local government attorneys who participate in NIMLO advise the members of their governments' legislative and regulatory bodies in many of the legal aspects of the governments' operations, including regulation of public rights-of-way pursuant to statute or charter, compliance with prerequisites in seeking federal financial assistance for contemplated projects, and the exercise of eminent domain powers and consequent proceedings in condemnation. These attorneys also represent their municipalities in actions instituted against those governments as a result of the implementation of policies and procedures established with respect to these governmental functions. The City of Norfolk, Virginia, which may become responsible for making any payments due respondent if the Fourth Circuit decision is upheld, is a member of NIMLO.

This Court refused to countenance undue federal legislative and judicial interference with important functions of local government in such cases as *National League of Cities v. Usery,* 426 U.S. 833 (1976), and *Rizzo v. Goode,* 423 U.S. 362 (1976). The members of NIMLO suggest that to interpret the Uniform Relocation Assistance and Real Property Acquisitions Policies Act of 1970 as overriding or preempting state and local law pertaining to the relocation of utilities occupying public rights-of-way is also an improper exercise of federal judicial power. Absent a clear legislative expression that such an application of the Uniform Relocation Act was intended, abrogation of state common law, especially in light of the fact that business interests of utility companies may be adequately protected by alternative means unavailable to most businesses, constitutes an unwarranted strain on federal-state relations and imposes impractical fiscal burdens on the efforts of local governments to advance the public health and welfare. The deple-

tion of available monies resulting from a required reimbursement to utility companies for discontinuing the gratuitous use of public rights-of-way would increase the hardship on local governments seeking to finance public improvements. This effect would be contrary to the public interest, and the National Institute of Municipal Law Officers suggests that such an interpretation of the Uniform Relocation Act also would be violative of accepted standards of statutory construction, as enunciated by this Court. Consequently, NIMLO urges reversal of the judgment rendered in this case by the United States Court of Appeals for the Fourth Circuit.

STATEMENT OF THE CASE

The statement of the case as set forth in Petitioner's Petition for a Writ of Certiorari is adopted by the National Institute of Municipal Law Officers for purposes of this brief amicus curiae.

SUMMARY OF ARGUMENT

The general common law responsibility of utility companies to pay their own costs when required to relocate from public rights-of-way is clearly established by many state court decisions. According to a long-standing rule of construction, absent express legislative abrogation of this principle, the common law rule continues to govern the relationships between utilities and local governmental entities. The Uniform Relocation Assistance and Real Property Acquisitions Policies Act of 1970 does not constitute a sufficiently clear statement of congressional intent to override common law rules governing the rights and responsibilities of utility companies in their occupation and use of public rights-of-way.

ARGUMENT

The Uniform Relocation Assistance and Real Property Acquisitions Policies Act of 1970 ["URA" or "Uniform Relocation Act"], 42 U.S.C. §§ 4601 *et seq.* (1976), establishes a policy of reimbursing persons for their costs of relocating homes and businesses displaced as a result of projects funded using federal monies. Traditional well-known common law rules applicable in many states, which were established long before the enactment of the URA, make utility companies occupying public rights-of-way responsible for the costs of moving their equipment and facilities from those rights-of-way at the request of the appropriate governmental unit. Typically the expenses of relocation are recouped by utility companies through rates established after proper presentation to and consideration by regulatory and ratemaking authorities. Any modification of the standard operation of common law rules and regulatory processes now governing the relationships between utility companies, state and local governments, and the public may be accomplished only by legislative action that clearly intends such a modification.

Despite the well-known common law practices, Congress did not expressly address the unique status of utility companies in occupying public rights-of-way in its extensive consideration of the Uniform Relocation Act. The URA, which has a clear and laudable goal of protecting individuals and small businesses from being unfairly, and perhaps irreversibly, damaged by forced relocations, does not clearly extend its concern or the largess it represents to such public service enterprises as utility companies, which already enjoy special privileges bestowed because of their unique nature. To read such an intent into the URA, and therefore into all state legislation subsequently adopted in

conformance with the URA, defies traditional common law rules and will greatly burden efforts, recognized as important in other federal legislation, to utilize limited federal and state funds in the manner of greatest benefit to the health and welfare of the public. The decision of the Fourth Circuit below should be reversed, and state law should prevail unless and until Congress itself speaks clearly to the issue raised in a manner consistent with the United States Constitution. This it has so far failed to do.

I. BECAUSE OF THEIR UNIQUE NATURE, UTILITIES MAY BE SUBJECT TO SPECIAL STATE COMMON LAW RULES AND REGULATORY PROCEDURES, WHICH ARE TO BE DEEMED APPLICABLE UNLESS MODIFIED BY CONTRACT OR EXPRESS LEGISLATIVE ACTION.

A. Common law mandates that respondent, C & P Telephone Company, pay its own costs for relocation of its facilities from public rights-of-way.

Generally, utilities occupying public rights-of-way have a common law duty to relocate their facilities at their own expense whenever public convenience or necessity so require. *See,* 12 McQuillin, *Municipal Corporations,* § 34.74a (3d ed. 1970); *Mountain States Telephone and Telegraph Co. v. Boise Redevelopment Agency,* 101 Idaho 30, 607 P.2d 1084 (1980), and cases cited therein. The common law rule applies whether a utility's presence in the rights-of-way results from the grant of an easement, a permit or a franchise:

> "Charters, franchises, statutory grants and permits affording the use of public ways to utility locations are subservient, *expressly or by im-*

> *plication,* in the exercise of governmental functions, to public travel and to the paramount police power and relocation of utility facilities in public streets or ways are at utility expense, a common law liability unless abrogated by the *clear* import of the language used in a particular statute."

Connecticut Railway and Lighting Co. v. New Britain Redevelopment Comm'n, 161 Conn. 234, 240, 287 A.2d 362, 365 (1971) (emphasis added) (quoting 4 NICHOLS, EMINENT DOMAIN § 15.22 (3d ed.)).

The common law rule has developed from a recognition that streets are regulated in the public trust through the exercise of the police power of a state or local government. *See, Michigan Bell Telephone Co. v. City of Detroit,* 106 Mich. App. 690, 308 N.W.2d 608 (1981), and cases cited therein. In removing urban blight and slums through redevelopment, a governmental entity is acting through its police power, and vacating streets to accommodate a redevelopment project is a proper governmental[1] use of the streets. *Mountain States Telephone and Telegraph Co. v. Boise Redevelopment Agency,* 101 Idaho 30, 607 P.2d 1084 (1980).

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[1]In fact, the Virginia Legislature has expressly recognized redevelopment and the provision of housing for low- and moderate-income persons as a governmental function in furtherance of which the state and its cities may properly exercise their police powers. VA. CODE § 36-55.25 (1982). Even were such activity to be deemed proprietary in nature, the distinction has been labeled "of dubious value" and rejected as a basis for allowing recovery of a utility's relocation costs. *Pacific Telephone and Telegraph Co. v. Redevelopment Agency,* 75 Cal.App.3d 957, 142 Cal.Rptr. 584, 591 (1977); *contra, Michigan Bell Telephone Co. v. City of Detroit,* 106 Mich. App. 690, 308 N.W.2d 608 (1981).

Furthermore, while the authority of a telephone company to occupy and use public rights-of-way in Virginia is granted by state statute, VA. CODE § 56-458 (1950), such use is expressly subject to "such terms, regulations and restrictions as may be imposed by the [municipal] corporate authorities . . . ." VA. CODE § 56-460 (1950). Even absent an express reservation of the right to impose subsequent conditions on a utility's use of a public right-of-way, the utility's occupancy would be deemed subject to future regulations required for the public health and welfare. *New Orleans Gaslight Co. v. Drainage Comm'n of New Orleans,* 197 U.S. 453 (1905).

Permission to occupy and use the public rights-of-way in Virginia does not constitute an interest in land protected by any requirement that compensation be made when relocation is necessitated. *See, Potomac Electric Power Co. v. Fugate,* 211 Va. 745, 180 S.E.2d 657 (1971). Where a utility enjoys the use of public rights-of-way subject to unspecified conditions relating to the public benefit, as determined by governmental authorities, the utility "should not be heard to complain when the progress of a community requires that the use of the street involved be terminated." *Western Union Telegraph Co. v. Tarrant County,* 450 S.W.2d 763 (Tex. Civ. App. 1970) (relocation of city's utilities required for solely aesthetic purposes); *see also, Union Electric Co. v. Land Clearance for Redevelopment Authority of St. Louis,* 555 S.W.2d 29 (Mo. 1977).

B. The ratemaking process is a sufficient and preferable means through which utilities may be allowed to recover extraordinary expenses for relocation.

Commonly, a state or local regulatory entity is delegated responsibility for establishing the rates that may be charged to utility customers. The ratemaking function is typically a complex matter, requiring consideration of both a great amount of technical testimony and the best interests of the consumers. *See, Consumers Power Co. v. Costle,* 615 F.2d 1147, 1150 (6th Cir. 1980). As in Virginia, the interests of the utility may be protected by a requirement that the established rates be "just and reasonable,"[2] which allows for expenses and a fair rate of return.[3] In practice, the interests of the utility are much better protected in the ratemaking process than are the interests of the public. As has been observed of the Virginia process:

> Utility rate cases offer a strange amalgam of adversarial and inquisitorial fact-finding formats. The public utilities, with their extensive legal staffs and expert witnesses, participate before the State Corporation Commission as fully prepared adversaries. Any student of regulation in Virginia who attends any of the major utility rate cases could only conclude that the preparation and presentation of the utilities is impressive, complete and compelling.

Schell and Sparks, "Public Participation in the Regulation of Utilities by the Virginia State Corporation Commis-

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[2]VA. CODE ANN. §§ 56-234 to-235 (1950).

[3]*Commonwealth v. VEPCO,* 211 Va. 758, 766, 180 S.E.2d 675, 681 (1971).

sion: How the Commission Makes Public Policy While It Makes Rates," 18 WM. & MARY L. REV. 73, 78 (1976).[4]

The integrity of the established ratemaking procedures in Virginia has been improperly disturbed by the Fourth Circuit as a result of its decision below. Similarly to the area of taxation administration, the area of state regulation of public utilities is to be treated with special care by the federal courts, as is evidenced by the Johnson Act, 28 U.S.C. § 1342 (1976). 1A J. MOORE, W. TAGGART, A. VESTAL & J. WICKER, MOORE'S FEDERAL PRACTICE ¶ 0.206 (1982); *Minnesota Gas Co. v. Public Service Comm'n,* 523 F.2d 581 (8th Cir. 1975), *cert. denied,* 424 U.S. 915 (1976). Thus, what respondent has so far succeeded in doing, contrary to the spirit of the Johnson Act, is to exacerbate federal-state relations through urging a finding of indirect and implied federal powers to overrule the state and local ratemaking process.[5] Since the case here for review by this Court does not present any allegation that a ratemaking authority had denied respondent due process of law, or that any rate-setting order had been repugnant to the United States Constitution, the Court should refuse to allow state law and regulatory processes to be abrogated by an unclear congressional action, that has been interpreted so as to be damaging and contradictory to other federal policies.

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[4]The authors also note that even where the public mounts the best effort possible to present the consumer viewpoint in state ratemaking proceedings, utilities generally can outmatch these efforts. In addition, because public resources are so limited, commitment of those resources to one rate case, in effect, diverts the resources from other rate cases. The authors point out that while such concerns are indicated in rate cases involving utilities and the state, the burden is even heavier in claims pitting the utilities against local governments. 18 WM. & MARY L. REV. at 82-86.

[5]*See, Tennyson v. Gas Service Co.,* 506 F.2d 1135 (10th Cir. 1974).

C. A determination that state law and regulations should be modified may be accomplished only through contract with or other clear action by an appropriate legislative authority.

The determination that the burden for relocation costs should be shifted from a utility's rate payers to other state and federal taxpayers is properly a legislative matter. Such was the finding in a California case involving a state law similar to the Uniform Relocation Act, *Pacific Telephone and Telegraph Co. v. Redevelopment Agency of Glendale,* 87 Cal. App.3d 296, 151 Cal. Rptr. 68 (1978). In that case, the court held that the intent to change the common law rule regarding utility relocation expenses cannot be inferred from broad general definitions. While the broad statement of policy declared as the basis for the URA reflects a concern for the allocation of consequential losses in eminent domain, the unusual requirement that utilities be reimbursed for expenses incurred in moving from public rights-of-way was never addressed by the federal legislators and involves economic considerations beyond the reach of the judiciary.[6]

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[6]In fact, the allocation of consequential damages for relocation under the URA is intended to ease the impact of required relocation on the "people who are least able to absorb the burden of these Federal programs." 115 CONG. REC. 31,533, 31,534 (1969) (statement of Sen. Muskie). The allocations clearly made under the URA presumably reflect a belief that the governmental entities can bear the costs more easily than the displaced individuals or businesses. However, with respect to utility relocations, there has been no consideration as to whether the governmental entities could pass on this increased expense to the public more easily than the utility could pass the expense on to its ratepayers. In fact, the ability of the governmental entity to distribute the expense may be impaired by not uncommon taxation and debt limitations to which the entity may be subject.

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Where there exists the power to contract, a modification of the common law also may be effected by express provisions within a contract between a utility and the governmental entity. Such was the case in *Newport Electric Corp. v. Redevelopment Agency of Newport,* 116 R.I. 22, 351 A.2d 590 (1976), in which the agency was ordered to pay the utility's relocation costs.[7] In cases having similar results, clear legislative intent can be found in two ways: the delegation of the power to contract, and the actual decision to contract. Therefore, the common law principle has been subjugated to contrary legislative action.

II. THERE HAS BEEN NO LEGISLATIVE ACTION THAT EXPRESSLY OR IMPLIEDLY ABROGATES THE COMMON LAW RULES AND CONTRACT PROVISIONS GOVERNING THE RELATIONSHIPS AMONG THE PARTIES, CITY AND H.U.D. IN THIS CASE, OR THAT WOULD SUPPORT THE IMPOSITION OF SIGNIFICANT FINANCIAL BURDENS ON LOCAL GOVERNMENTS NATIONWIDE.

The portion of the Uniform Relocation Act that is applicable in this case has the purpose of assuring that displaced persons " . . . shall not suffer disproportionate injuries as a result of programs designed for the benefit of the public as a whole." 42 U.S.C. § 4621 (1976). With respect to consequential damages in eminent domain, expense allocation has been recommended where the governmental activity is necessary to promote the public health and welfare, but resultant expenses are too burdensome to

[7]However, this case involved the relocation of power lines underground, and the costs awarded to the utility were computed according to the reasonable value of the work, less sums that would have been expended for the relocation of an overhead system.

be incurred by the injured individuals.[8] Such a concern is not valid when directed at utility companies where, as shown above, the expenses for relocation are expected and incurred willingly by virtue of accepting permission to occupy public rights-of-way, and reimbursement of expenses is made through the ratemaking device.

A. Congress has not expressed an intention to impose the extraordinary costs of utility relocations on states and their political subdivisions.

The legislative history, as argued by petitioner and discussed by the Fourth Circuit below, *Chesapeake and Potomac Telephone Co. of Virginia v. Landrieu,* 674 F.2d 298 (4th Cir. 1982), does not indicate that Congress considered the status of public or quasi-public businesses, such as utility companies, in enacting the Uniform Relocation Act. This fact, where coupled with indications that Congress did not intend the URA to create any rights or liabilities, 42 U.S.C. § 4602 (1976); *Consumers Power Co. v. Costle,* 615 F.2d 1147 (6th Cir. 1980), demonstrates that Congress did not intend the URA to change well-known and long-settled common law rules governing utility relocations.

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[8] *See,* Sipes and McCoid, "Recovery of Consequential Damages in Eminent Domain," 48 VA. L. REV. 437 (1962). In fact, similar language is found in the House Report accompanying the legislation: " . . . [t]he result far too often has been that a few citizens have been called upon to bear the burden of meeting public needs." H. REP. No. 1656, 91st Cong., 2d Sess. 2, *reprinted in* 1970 U.S. CODE CONG. & AD. NEWS 5850, 5851. The purpose of the legislation was explained as " . . . provid[ing] a humanitarian program of relocation payments . . . and other assistance to owners and tenants displaced from their homes, farms and places of business." *Id.*, 1970 U.S. CODE CONG. & AD. NEWS at 5852.

Respondent has not been able to prove that Congress intended to provide relocation assistance to utility companies pursuant to the URA. Therefore, the rule of construction that there may be no statutory abrogation of the common law absent a clear and explicit expression of such legislative intent must be applied to defeat respondent's claim.[9] Respondent's task to demonstrate such legislative intent is a heavy burden:

> . . . The case for inferring intent is at its weakest where, as here, the rights asserted impose *affirmative* obligations on the States to fund certain services, since we may assume that Congress will not implicitly attempt to impose massive financial obligations on the States.

Pennhurst State School and Hospital v. Halderman, 451 U.S. 1, 16-17 (1981) (emphasis in original).

In *Pennhurst,* this Court reaffirmed that a determination that states have agreed to comply with federally imposed conditions rests on whether those conditions had been knowingly and voluntarily accepted:

> There can, of course, be no knowing acceptance if a State is unaware of the conditions or is unable to ascertain what is expected of it. Accordingly, if Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously . . . . By insisting that Congress speak with a clear voice, we enable the States to exercise their choice knowingly, cognizant of the consequences of their participation.

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[9] *See, Robert C. Herd & Co., Inc. v. Krawill Machinery Corp.,* 359 U.S. 297, 301-302 (1959); *Shaw v. Merchants' National Bank of St. Louis,* 101 U.S. 557, 565 (1880); *Fairfax's Devisee v. Hunter's Lessee,* 11 U.S. (7 Cranch) 603, 623 (1812).

Id. at 17 (citations omitted).

The canon requiring a clear expression of legislative intent ". . . applies with greatest force where, as here, a State's potential obligations under the Act are largely indeterminate." *Id.* at 25. The protection afforded to the states as a result of invoking this rule of construction in *Pennhurst* is equally warranted for the Norfolk Redevelopment and Housing Authority, and therefore similarly situated state political subdivisions nationwide, in the instant case. As this Court noted in *Pennhurst:*

> . . . The crucial inquiry, however, is not whether a State would knowingly undertake that obligation, but whether Congress spoke so clearly that we can fairly say that the State could make an informed choice. In this case, Congress fell well short of providing clear notice . . . . Though Congress' power to legislate under the Spending Power is broad, it does not include surprising participating States with post-acceptance or "retroactive" conditions.

Id. at 25.

Interpretation of the URA a dozen years after its enactment as applying to utility companies precluded under state law from claiming relocation costs could be catastrophic for local governments, which generally have not planned for such expenses.[10] In addition, requiring

[10]In a recent survey of NIMLO members, summarized herein at Appendix A, many of the responses indicated concern that claims that may be made by utility companies, if the Fourth Circuit decision is upheld, would burden the financial resources available for desirable and essential public projects. This survey, though limited by time restrictions, demonstrates that throughout the country, state law generally requires utility companies to pay their own costs of

reimbursement of utility relocation costs could force a change in the traditional agreements for use of public rights-of-way by utility companies. In order to recoup the expenses attendant to requesting utilities to relocate, local governments may be compelled to seek legislative approval to charge rent or fees for the use of public rights-of-way.

B. Subsequent congressional actions and policy reasons are contraindicative to the extension of relocation benefits to utility companies.

The URA and conforming state legislation are not intended as creating or removing elements of damage in the law of eminent domain as developed in the states. *Creative Displays, Inc. v. South Carolina Highway Dept.*, 272 S.C. 68, 71, 248 S.E.2d 916, 919 (1978). The scope of the URA has been analyzed in relation to other enactments of Congress, especially the Federal-Aid Highway Act of 1958, 23 U.S.C. § 123 (1976). A persuasive analysis of the interplay of these two statutes can be found in *Artesian Water Co.*

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relocating from public rights-of-way. In addition, thirty-eight of the responses reported specific amounts for utility relocation claims that have been made or may be expected in those jurisdictions. The amount of total potential liability for such costs in those jurisdictions able to assign values to the claims ranged from $4,000.00 to $3,500,000.00. The average aggregate value of claims reported by these thirty-eight jurisdictions was $351,269.76. Projecting this average over the local governments that could anticipate claims being made if the Fourth Circuit decision is upheld, the total additional costs of projects undertaken for the public health and welfare would be very large. Clearly such a financial burden should not be lightly passed on to the already strained budgets of local governments, of which there are approximately 40,000 nationwide, exclusive of school and special districts. INTERNATIONAL CITY MANAGEMENT ASSOC., THE MUNICIPAL YEAR BOOK 1982 (1982).

v. State Dept. of Highways & Transportation, 330 A.2d 432 (Super. Ct.), *affirmed as modified,* 330 A.2d 441 (Del. 1974):

> . . . The point to be made here is that the U.R.A. did not alter the prior scheme insofar as those "persons" who are entitled to benefits are concerned, but rather the procedure for and the extent of coverage to be had for those "persons" thereby qualifying under the Act. Artesian's contention that the U.R.A. expanded on the class of persons entitled to coverage to include all utilities is therefore an unwarranted interpretation of the Act. Consequently, while the U.R.A. was not intended to afford less protection or assistance to persons displaced under the Federal-Aid Highway Act, . . . neither does it extend coverage to include utilities within its definition of displaced persons or businesses. Moreover, to construe the U.R.A. in absolute terms, as including utilities within its applicable provisions, would undoubtedly render nugatory Section 123 of the Federal-Aid Highway Act. . . .

Id. at 438 (citation omitted).[11]

Congress itself acknowledged that utilities are not necessarily included within the meaning of "displaced persons" under the URA by adopting post-URA legislation, in its role as the District of Columbia's final legislative authority before the District of Columbia was granted

[11]In affirming the lower court, the Supreme Court of Delaware agreed with the superior court's "learned discussion" on the effect of federal and state relocation statutes, 330 A.2d at 442. However, the Delaware Supreme Court also found reimbursement of relocation expenses to be precluded by the operation of applicable franchise contracts.

home rule powers. This post-URA legislation provides reimbursement to utilities required to relocate from District of Columbia public rights-of-way as a result of urban redevelopment. District of Columbia Public Utilities Reimbursement Act of 1972, Pub. L. 92-495, 86 Stat. 812 (Oct. 14, 1972).

Furthermore, reason dictates that the meaning of "displaced persons" under the Uniform Relocation Act cannot be unlimited. Extending the definition to include investor-owned utility companies would force local governments to commit a disproportionate amount of public funds to assist utilities in relocation, even though the utilities do not have any real property interest in the land affected by governmental action.[12] Such a requirement is clearly counterproductive to the purposes of such public-oriented efforts as the urban redevelopment project involved in the instant case. The possibilities become even more absurd where relocation benefits are not limited to investor-owned utilities, but may be claimed by public utilities operating in several independent jurisdictions. In such a case, one governmental entity might be compelled to pay relocation costs to a separate governmental entity, a result that could be very hard to explain to local taxpayers.

Finally, armed with a right to claim relocation benefits pursuant to the Uniform Relocation Act, utilities could then adopt a selective approach to claiming relocation benefits. With this tactic, the utility companies could ensure the success of projects which by their nature would result in high usage redevelopment, and the abandonment of other kinds of development, such as low-income housing.

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[12] *See, Shepard v. Dept. of Community Corrections*, 293 Or. 191, 205, 646 P.2d 1322, 1329 (1982).

CONCLUSION

For the foregoing reasons, the National Institute of Municipal Law Officers, as *amicus curiae,* respectfully submits that the decision rendered by the United States Court of Appeals for the Fourth Circuit in this case should be reversed.

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APPENDIX

The following is a summary of a survey of NIMLO's membership of their understanding of the current status of the law applicable in their states and local governments regarding the payment of the costs of utilities required to relocate from public rights-of-way. Should respondent ultimately prevail in the instant case, the decision might serve as a catalyst for a multiplicity of claims involving past and present projects. These projects would include, among others, highway projects, airport improvements, street resurfacing program activities supported by Community Development monies, Urban Development Action Grants, and several traditional urban renewal projects. The information gathered from NIMLO members concerning specific amounts of claims is necessarily more difficult to compile than expressions of recognition and concern for the financial problems created for local governments; because of the past ability to generally forestall such claims, the potential amount of future claims that can already be foreseen cannot be accurately calculated. In addition, other municipal attorneys express a concern about the potential impact of the Fourth Circuit decision even though they do not yet know of any possible future projects that may be affected by this holding.

The number of responses to the NIMLO survey was limited because of the short time within which the members were asked to return the responses. It is believed, however, that the survey represents a fair national sampling of the status of the law governing utility relocation costs and claims expected if the Fourth Circuit decision is upheld.

JURISDICTION	Utilities required to pay relocation costs	Claims Expected if 4th Cir. upheld
ALABAMA		
Gadsden	X	X
ALASKA		
Juneau	X	
Kenai		X
ARIZONA		
Glendale	X	
Mesa		X
Tempe	X	
Tucson	X	
Yuma	X	
ARKANSAS		
Fayetteville	X	
CALIFORNIA		
Alameda	X	
Anaheim	(Municipally Owned)	
Burbank	X	X
Carlsbad	X	
Claremont/Laverne	X	X
Clovis	X	X
Compton	X	
Concord	X	
Davis	X	
Escondido	X	
Eureka	X	X
Fresno	X	X
Fullerton	X	
Glendale	X	X
Huntington Beach	X	X
Lodi	X	
Long Beach	X	X
Los Angeles	X	
Mountain View	X	X
Oakland	X	X
Palm Springs	X	
Pittsburg	X	X
Roseville	X	

Salinas	X	X
San Bernardino	X	X
San Buenaventura	X	X
San Diego	X	X
San Francisco	X	
San Jose	X	
San Leandro	X	X
Santa Cruz	X	X
Santa Fe Springs, Commerce & Duarte	X	
South San Francisco	X	X
Thousand Oaks	X	X
Torrance	X	
Watsonville	X	
COLORADO		
Aurora	X	X
Boulder	X	
Denver	X	
Englewood	X	X
Greeley	X	X
Lakewood	X	
Montrose	X	X
Sterling	X	X
CONNECTICUT		
Milford	X	X
DELAWARE		
Dover	X	
DISTRICT OF COLUMBIA		X
FLORIDA		
Belle Glade	X	X
Cocoa Beach	X	
Daytona	X	X
Hialeah	X	
Maitland	X	
North Miami	X	
North Port	X	
Orlando	X	
Pensacola	X	
Plant City	X	
Titusville	X	

GEORGIA		
Columbus	X	
Cordele		X
Gainesville	X	X
HAWAII		
Honolulu	X	
IDAHO		
Coeur D'Alene	X	
Lewiston	X	
Moscow	X	X
Pocatello	X	X
ILLINOIS		
Barrington		X
Bloomington	X	
Crystal Lake		X
Danville	X	
Decatur	X	X
Elgin	X	
Hanover Park	X	X
Kankakee	X	
Lake Bluff	X	
Niles	X	X
Pekin	X	
Peoria		X
Urbana	X	
Wilmette	X	
INDIANA		
Beech Grove	X	X
Indianapolis	X	X
IOWA		
Ames	X	
Cedar Rapids	X	X
Council Bluffs	X	
Davenport	X	X
Sioux City	X	X
Spencer	X	

KANSAS		
Hutchinson	X	
Olathe	X	X
Overland Park	X	X
Shawnee	X	X
Wichita	X	
KENTUCKY		
Louisville	X	
Owensboro	X	X
Versailles		X
LOUISIANA		
Monroe	X	
MAINE		
South Portland	X	
MARYLAND		
Baltimore	X	X
Cumberland	X	X
Harford County	X	
Prince George's County		X
MASSACHUSETTS		
Cambridge		X
MICHIGAN		
Ann Arbor	X	
Grand Rapids	X	
Jackson	X	X
Lansing	X	X
Norton Shores	X	X
Southfield	X	
Traverse City	X	X
Wyoming		X
MINNESOTA		
Brooklyn Park	X	X
Rochester	X	
MISSOURI		
Ferguson	X	X
Hannibal	X	X
Liberty	X	
Saint Charles	X	X
Saint Louis	X	
Springfield	X	X

NEBRASKA		
Grand Island		X
Kimball	X	
Lexington	X	
Omaha	X	X
Scottsbluff	X	X
NEVADA		
Las Vegas	X	
Reno	X	X
NEW JERSEY		
Atlantic County	X	
Jersey City	X	
Newark	X	X
Ridgewood	X	
Teaneck	X	X
Trenton	X	
NEW MEXICO		
Hobbs	X	
NEW YORK		
Albany	X	
Freeport	X	
Fulton	X	X
Lockport	X	X
New Rochelle	X	
NORTH CAROLINA		
Burlington	X	
Carrboro	X	X
Charlotte		X
Durham	X	
Greensboro	X	X
Raleigh		X
Winston-Salem	X	
OHIO		
Akron	X	X
Cincinnati	X	
Dayton	X	
Kettering	X	X
Maumee	X	
Shaker Heights	X	
OKLAHOMA		
Bethany		X
Oklahoma City		X

OREGON		
Deschutes County		X
Estacada	X	
Medford	X	
Pendleton	X	
Portland	X	X
Salem	X	X
Springfield	X	
Tigard	X	X
PENNSYLVANIA		
Allentown	X	
Philadelphia	X	X
SOUTH CAROLINA		
Charleston	X	X
Columbia	X	
Spartanburg	X	X
SOUTH DAKOTA		
Aberdeen		X
Sioux Falls	X	
TENNESSEE		
Chattanooga	X	X
Jackson	X	X
Memphis	X	
Murfreesboro	X	X
Smyrna	X	X
TEXAS		
Arlington	X	
Beaumont	X	X
Bellaire	X	X
Big Spring	X	X
Dallas	X	
Farmers Branch	X	
Grand Prairie	X	
Plano	X	
San Antonio	X	X
Texarkana	X	
UTAH		
Murray City	X	X
Salt Lake City	X	X
VERMONT		
Montpelier	X	X

VIRGINIA		
Alexandria	X	X
Chesapeake	X	
Fairfax	X	
Fairfax County	X	X
Hampton	X	X
Richmond	X	X
Roanoke	X	X
Suffolk	X	X
Virginia Beach	X	X
York County	X	X
WASHINGTON		
Bellevue	X	
Kent	X	X
Tacoma	X	X
Vancouver	X	
Yakima	X	
WISCONSIN		
Eau Claire	X	
Madison	X	X
Sheboygan		X

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Docket No. 81-2332

IN THE
SUPREME COURT OF
THE UNITED STATES

OCTOBER TERM, 1982

NORFOLK REDEVELOPMENT AND HOUSING AUTHORITY, a political subdivision of the Commonwealth of Virginia,

Petitioner,

v.

THE CHESAPEAKE AND POTOMAC TELEPHONE COMPANY OF VIRGINIA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF OF THE CITY OF NEW YORK, AMICUS CURIAE

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QUESTION PRESENTED

Whether a public utility is a "displaced person" under the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, 42 U.S.C. §§4601 et seq., when it seeks reimbursement for the cost of removing its distribution facilities from public rights-of-way in the execution of an urban renewal project funded in part by grants from the United States Department of Housing and Urban Development.

TABLE OF CONTENTS

	Page
Question Presented.....	i
Table of Contents.....	ii
Table of Authorities.....	iii
Interest of the Amicus Curiae.....	1
Summary of Argument.....	4
ARGUMENT -	
THE DETERMINATION OF THE COURT OF APPEALS THAT A UTILITY COMPANY WHOSE DISTRIBUTION FACILITIES IN THE PUBLIC STREETS WERE REMOVED AS THE RESULT OF AN URBAN RENEWAL PROJECT CAN QUALIFY AS A "DISPLACED PERSON" UNDER THE UNIFORM RELOCATION ASSISTANCE AND REAL PROPERTY ACQUISITION POLICIES ACT, 42 U.S.C. §4601 et seq., IS INCONSISTENT WITH THE LEGISLATIVE PURPOSE OF THAT ACT.....	6
Conclusion.....	26

TABLE OF AUTHORITIES

Page

Cases

Alexander v. United States Department of Housing and Urban Development, 441 U.S. 39 (1979)..... 10

Artesian Water Co. v. State Dept. of Hwys. & Transp., 330 A. 2d 432 (Del. Super. Ct., 1974), mod. on other grounds, 330 A. 2d 441 (Del., 1974)..... 21, 22 24

Chesapeake and Potamac Telephone Co. of Virginia v. Landrieu, No. 81-1602 (E.D. Va., June 4, 1981)... 21

Connecticut Railway & Lighting Co. v. New Britain Redevelopment Comm., 161 Conn. 234, 287 A. 2d 362 (1971).... 9

Consolidated Edison Co. v. Lindsay, Matter of, 24 NY 2d 309, 300 N.Y.S. 2d 321, 248 N.E. 2d 150 (1969)..... 7

Consumers Power Co. v. Costle, 615 F. 2d 1147 (6th Cir., 1980)..... 21, 22,

Holy Trinity Church v. United States, 143 U.S. 457 (1892)..... 19

Lone Star Gas Co. v. Landrieu, No. 80-100-C (E.D. Okla., March 30, 1981)..... 21, 22

Mountain States Telephone & Telegraph Co. v. Boise Redevelopment Agency, No. 52891 (Idaho Dist. Ct., Oct. 27, 1980)..... 21-22, 23

N.Y. Tel. Co. v. City of Binghamton, 18 NY 2d 152, 272 N.Y.S. 2d 359, 219 N.E. 2d 184 (1966)..... 8

Pacific Telephone and Telegraph Company v. Redev. Agency of Glendale, 87 Cal. App. 3d 296, 151 Cal. Rptr. 68 (Ct. App., 1978)..... 9, 22

Public Service Co. of Oklahoma v. Harris, No. 79-C-37-BT (N.D. Okla., August 22, 1980)..... 21

Steelworkers v. Weber, 443 U.S. 193 (1979)..... 19

Transit Comm. v. Long Is. R. R. Co., 253 NY 345, 171 N.E. 565 (1930)..... 8

Statutes

23 U.S.C., § 123..... 22, 23, 24

42 U.S.C., § 4601, et. seq..... 2, 6, 10, 16-18

District of Columbia Public Utilities Reimbursement Act of 1972, Public Law 92-495, 86 Stat. 812..... 24-25

Federal-Aid Highway Act of 1968, Public Law 90-495, 82 Stat. 815, § 30..... 24

Miscellaneous

12 McQuillen, Municipal Corporations, § 34.74a..... 9

Hearings Before the Subcommittee on Intergovernmental Relations of the Senate Committee on Government Operations, 91st Cong., 1st Sess. (1969)..... 15

Hearings on S. 1201 and S. 1681 before the Subcommittee on Intergovernmental Operations, 89th Cong., 1st Sess. (1965)..... 13-14

H.R. Rep. No. 91-1656, reprinted at 1970 U.S. Code Cong. and Adm. News, p. 5850..... 20

Select Subcommittee on Real Property Acquisition of the House Committee on Public Works, Study of Compensation and Assistance for Persons Affected by Real Property Acquisition in Federal and Federally Assisted Programs, 88th Cong., 2d Sess. (Comm. Print 1965)..... 11-14, 20

Uniform Relocation Assistance and Land Acquisitions Policies - 1970; Hearings on H.R. 14898, H.R. 14899, S. 1 and Related Bills before the House Committee on Public Works, 91st Cong., 1st and 2d Sess., 1969-1970..... 16

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BRIEF OF THE CITY OF NEW YORK, AMICUS CURIAE

INTEREST OF THE AMICUS CURIAE

The City of New York is the most populous municipality in the nation and, as would be

expected of a city of its age and size, has engaged in numerous urban redevelopment programs to upgrade blighted or underdeveloped areas within its borders. The acquisition of properties for such programs has been made by the City, through its Department of Housing Preservation and Development. Like other municipalities, New York has relied on federal financial assistance to enable it to carry out such programs.

The subject litigation concerns the relocation of the respondent utility's distribution facilities located in streets which were closed to facilitate the development of urban renewal projects. The adjoining land had been acquired by the petitioner development authority, and the respondent utility seeks relocation benefits under the Uniform Relocation Assistance and Real Property Acquisition Act of 1970 ("Relocation Act"), 42 U.S.C., §4601, et seq. The Court of Appeals for the Fourth Circuit reversed the District Court and held that the respondent is

entitled to relocation benefits for most if not all of its removed facilities.

Since the effective date of the Relocation Act (January 2, 1971), almost 100 blocks of New York City streets have been closed in connection with the acquisition of land by the City for 28 urban renewal projects; subsequent development on such closed streets has resulted in the relocation or disconnection of the utility lines in the great majority of those closed streets. There remain more than 100 blocks of City streets which have been closed or which will be closed in the future in which it may be necessary that the utility facilities be relocated. All of these projects, accomplished with federal assistance, implicate the Relocation Act.

Although there have been almost no claims by New York City utilities for relocation benefits since the passage of the Relocation Act, an affirmance by this Court would alter that situation. In a time of curtailed federal

assistance to the States and their subdivisions, a holding that utilities such as respondent are entitled to benefits under the Relocation Act can only serve to further limit the federal funds available for urban redevelopment. Accordingly, the City of New York submits this brief as amicus curiae in support of petitioner's request for reversal.

SUMMARY OF ARGUMENT

We urge in our argument that respondent Chesapeake and Potomac Telephone Co. of Virginia is not entitled to benefits under the Relocation Act because Congress did not intend that a utility, forced to relocate its facilities in connection with an urban renewal project, be encompassed within the term "displaced person" as that term is defined under the Relocation Act. In support of that argument, we show that (1) under the common law of New York and the states across the nation, a utility franchise in the public streets is subject to the public necessity and

convenience, and the expense of relocating its facilities to conform to the public necessity and convenience must be borne by the utility; (2) the extensive legislative history of the Relocation Act is bereft of any indication that Congress was concerned with the effects of governmental takings on the facilities of utlities, or that the utilities themselves felt that they needed or were entitled to benefits under the Relocation Act; and (3), courts other than the Court of Appeals for the Fourth Circuit, in considering a utility's right to relocation benefits under the Relocation Act, have uniformly denied them in situations akin to the subject litigation.

ARGUMENT

THE DETERMINATION OF THE COURT OF APPEALS THAT A UTILITY COMPANY WHOSE DISTRIBUTION FACILITIES IN THE PUBLIC STREETS WERE REMOVED AS THE RESULT OF AN URBAN RENEWAL PROJECT CAN QUALIFY AS A "DISPLACED PERSON" UNDER THE UNIFORM RELOCATION ASSISTANCE AND REAL PROPERTY ACQUISITION POLICIES ACT, 42 U.S.C. §4601 et seq., IS INCONSISTENT WITH THE LEGISLATIVE PURPOSE OF THAT ACT.

(1)

The Court of Appeals, after minimal legal analysis and only the most cursory consideration of the legislative history of the Uniform Relocation Assistance and Real Property Acquisition Policies Act ("Relocation Act"), 42 U.S.C., §4601, et seq., held that a utility company that has been required to move certain of its in-street facilities, may constitute a "displaced person" as that term is defined in 42 U.S.C. §4601 and be entitled to payments under the Relocation

Act. [1] It is submitted that this decision is inconsistent with the Congressional purpose in passing the Relocation Act and will provide to utility companies a windfall never intended or contemplated by Congress.

Under the common law of New York, the State, or its political subdivisions, is not required to reimburse a utility when, acting in its governmental capacity, it has forced the utility company to relocate its facilities in the streets. The principle that the utility company must relocate its facilities at its own cost has been reaffirmed by the New York Court of Appeals in two cases involving the condemnation of property for urban renewal purposes. Matter of Cons. Edison Co. v. Lindsay, 24 NY2d 309, 300 N.Y.S. 2d 321, 248 N.E. 2d 150 (1969) (utility company required to bear the cost of relocating its facilities where land was condemned

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1. The decision of the Court of Appeals is reported at 674 F.2d 298.

for urban renewal project and for construction of a school); N.Y. Tel. Co. v. City of Binghamton, 18 NY2d 152, 272 N.Y.S. 2d 359, 219 N.E. 2d 184 (1966) (telephone company not entitled to reimbursement for the expense of relocating its telephone lines and other facilities where street was closed for use as part of a housing project). The rationale underlying these decisions was clearly set out in Transit Comm. v. Long Is. R.R. Co., 253 N.Y. 345, 171 N.E. 565 (1930), wherein, pursuant to state statute, a railroad grade crossing was to be eliminated with the necessary result that a gas main would have to be removed and relocated. The Court of Appeals held that the cost must be borne by the gas company, stating (253 NY at 351, 171 N.E. at 566):

> The Gas Company has received from the public authorities its franchise or privilege to lay and maintain its gas main under the surface of the public street. Without this grant from the people it has no rights in the highway. This privilege, or franchise, is at all times subject to the police power of the State; in other words, the company maintains its pipes subject to

> the obligation to remove them whenever the public health or safety require this to be done. Although authorized to lay its pipes in the public streets, the company takes the risk of their location and is bound to make such changes as the public convenience and security require, at its own cost and charge.

Likewise, under the common law of jurisdictions across the country, a utility's franchise in the streets is subject to the police power, and the utility must bear the expense where public convenience or security require the relocation of its facilities. 12 McQuillen, Municipal Corporations, §34.74a; see, e.g., Mountain State Telephone and Telegraph Co. v. Boise Development Agency, 101 Idaho 30, 607 P.2d 1084 (1980); Connecticut Railway & Lighting Co. v. New Britain Redevelopment Comm., 161 Conn. 234, 287 A.2d 362, 365 (1971); Pacific Telephone and Telegraph Company v. Redev. Agency of Glendale, 87 Cal. App. 3d 296, 151 Cal. Rptr. 68, 69 (Ct. App., 1978).

Accordingly, the decision of the Court of Appeals, when considered in light of the common law doctrine that a utility must bear the cost of relocating its facilities, and the legislative history and purpose of the Relocation Act, is clearly wrong and must be reversed.

(2)

This Court has considered the legislative history of the Relocation Act in Alexander v. United States Department of Housing and Urban Development, 441 U.S. 39 (1979), where this Court limited the definition of "displaced person" in 42 U.S.C. §4601(6)[2] to persons dislocated as the result of the acquisition or contemplated acquisition of real property for a federal or federally assisted program. As this Court noted (supra, at 49), the Relocation Act essentially grew out of a lengthy report completed in 1964 by

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2. 42 U.S.C., §4601(6) provides:

> The term "displaced person" means any person who, on or after January 2,

the Select Subcommittee on Real Property Acquisition of the House Public Works Committee.[3] In that study, which called for the standardization of federal relocation benefits, the Subcommittee took special note of

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(footnote 2 continued)

1971, moves from real property, or moves his personal property from real property, as a result of the acquisition of such real property, in whole or in part, or as the result of the written order of the acquiring agency to vacate real property, for a program or project undertaken by a Federal agency, or with Federal financial assistance; and solely for the purposes of sections 4622(a) and (b) and 4625 of this title, as a result of the acquisition of or as the result of the written order of the acquiring agency to vacate other real property, on which such person conducts a business or farm operation, for such program or project.

3. Select Subcommittee on Real Property Acquisition of the House Committee on Public Works, Study of Compensation and Assistance for Persons Affected by Real Property Acquisition in Federal and Federally Assisted Programs, 88th Cong., 2d Sess. (Comm. Print 1965) (hereinafter "Select Subcommittee Study").

the tremendous impact of property acquisition for federal and federally assisted programs on low income families who occupied the majority of the dwelling units acquired under urban renewal programs and constituted many of the families displaced by federally assisted highway programs. Select Subcommittee Study, pp. 21-22. In discussing displaced businesses, the report similarly focused on the problems of small, often tenant-occupied businesses who provided services to the local community; such small businesses were least able to withstand displacement and, in the case of tenant-occupied businesses, were, according to the Study, non-compensable under the laws of Eminent Domain. Ibid., pp. 26-27, 31-33, 107. In contrast, the report made no mention of the problems of utility companies whose facilities are frequently disturbed by federally assisted takings, and in instances where the various types of businesses affected by a taking are described

in the study, no mention is made of utility facilities. Ibid., pp. 474-475.

In 1965, hearings were held before the Subcommittee on Intergovernmental Relations of the Senate Committee on Government Operations, on proposed real estate acquisition and relocation legislation.[4] At the Senate hearings, testimony on the need for such legislation was given by representatives of various interested groups. For example, testimony was given by a representative of the National Federation of Independent Business, an association of small independent businessman. Senate Hearings, pp. 96-98. A statement was made on behalf of the Boston Redevelopment Authority. Ibid., pp. 189-91. Statements were also made on behalf

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4. Hearings on S. 1201 and S. 1681 before the Subcommittee on Intergovernmental Operations, 89th Cong., 1st Sess. (1965) (hereinafter, "Senate Hearings").

of the National Association for the Advancement of Colored People and the American Farm Bureau Federation. Ibid., pp. 236-240, 298-303. Communications were received from the National Association of Home Builders, the National Forest Products Association, the Eastern Baking Co., Inc. and the Austin-Hastings Co., Inc., the last being the owner of warehouses which were to be taken for a NASA site. Ibid., pp. 304-318. In other words, the various segments of the nation affected by government takings made public their position on the proposed legislation. However, there was no mention during those hearings of the needs of public utilities, and no public utility bothered to submit any communication to the subcommittee.

In February 1969, extensive hearings were held before the Senate Subcommittee on Intergovernmental Relations on S.1, the Senate bill which was referred to the House and, as amended by that

body, became the Relocation Act.[5] Again, at the 1969 Senate hearings, statements were made by, and communications received from, representatives of various segments of the nation interested in the proposed legislation, including, inter alia, the National Business League, the Outdoor Advertising Association of America, the American Farm Bureau and the National Federation of Independent Business. Ibid. pp. 157-159, 185-195, 263-266. Again, no communication was made on behalf of any public utility, nor was any mention made of the problems of utilities.

Similarly, at hearings in 1969 and 1970 held before the House Committee on Public Works, statements and comments by parties interested in

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5. Hearings Before the Subcommittee on Intergovernmental Relations of the Senate Committee on Government Operations, 91st Cong., 1st Sess. (1969) (hereinafter "1969 Senate hearings").

S.1 and related House bills were received.[6] Again there was no comment by utilities on the need for such legislation.

The Relocation Act, 42 U.S.C., §4601 et seq., passed in 1970, provides a number of remedies for a displaced person as that term is defined in the Act. Such benefits are obviously intended to assist displaced residential or business occupants of the property to be acquired, rather than utilities whose facilities must be removed. Pursuant to 42 U.S.C., §4622, a displaced person may be entitled to the actual reasonable expenses of moving himself, his business, and his personal property, and the actual reasonable expense of searching for a replacement business; he can also be reimbursed for the actual direct loss of tangible personal property, but not to exceed the

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6. Uniform Relocation Assistance and Land Acquisitions Policies-1970; Hearings on H.R. 14898, H.R. 14899, S.1 and Related Bills before the House Committee on Public Works, 91st Cong., 1st and 2d Sess., 1969-1970.

cost of relocating such personalty. Furthermore, one displaced from a residence may elect, instead of such actual expenses, allowances of up to $500. 42 U.S.C., §4622(b). Similarly, one displaced from a place of business or from a farm operation may elect to receive, in lieu of actual expenses, a fixed payment equivalent to the annual earnings of the business, not less than $2500 and not more than $10,000, and only if the business cannot be relocated without a substantial loss of patronage and is not part of a chain-store operation. 42 U.S.C., §4622(c). The Act also provides for payments to displaced homeowners to enable them to purchase a new home (42 U.S.C., § 4623) and for payments to those otherwise lawfully occupying a dwelling to enable such a person to obtain suitable housing (42 U.S.C., § 4624), and in each case such payments may not exceed a maximum set out in the statute. Such remedies are made available so that there might be "fair and equitable treatment of . . . [displaced]. . .

persons . . . in order that . . . [they] . . . shall not suffer disproportionate injuries as a result of programs designed for the benefit of the public as a whole". 42 U.S.C., §4621, "Declaration of policy".

(3)

It is submitted that in light of the legislative history and purpose of the Relocation Act, a utility whose distribution facilities in the public right-of-way are disturbed by the acquisition of real property is not a displaced person for purposes of the Act. While a liberal reading of the Relocation Act might appear to bring a utility like respondent Chesapeake and Potomac Telephone Co. within its coverage,[7]

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7. As noted by the Court of appeals, 674 F.2d at 300, "a business" is defined in 42 U.S.C., §4601(7) as "any lawful activity, excepting a farm operation, conducted primarily for: (A) the purchase, sale, lease, and rental of personal and real property, and for the manufacture, processing, or marketing of products, commodities, or any other personal property; (B) the sale of services to the public. . . ."

it is a familiar rule that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of its makers". Steelworkers v. Weber, 443 U.S. 193, 201 (1979), quoting Holy Trinity Church v. United States, 143 U.S. 457 (1892). While the Relocation Act was intended to make uniform the various programs for those who are affected by federal and federally assisted projects, the legislative history and scheme of the Relocation Act also demonstrates that it was intended to aid those residential and business occupants of property acquired or proposed to be acquired for such programs who would otherwise suffer a disproportionate harm from what was intended as a public benefit. Congress did not express any concern for the effect of governmental acquisitions on utilities whose facilities in the public way have always been subject to removal for the public convenience and necessity. Considering the nature of utilities, whose lines and other

facilities frequently permeate entire geographical areas, and who are often monopolies whose rates are set by the respective state or political subdivision, it would appear that such entities would rarely suffer "disproportionate injuries" from governmental acquisitions.

While the Court of Appeals was correct in its observation that Congress intended that the Relocation Act grant benefits beyond those which are provided at common law, Congress in fact was mainly concerned with occupants of the land whose estates might be insufficient to entitle them to an award under the traditional laws of Eminent Domain, but who were nevertheless severely damaged by the taking of property; such interests would include tenant-owned businesses (see Select Subcommittee Study, pp. 27-31) and residential tenants at will (see H.R. Rep. No. 91-1656, reprinted at 1970 U.S. Code Cong. and Adm. News, p. 5850, 5861). Congress did not intend to extend benefits to public utilities whose limited right

to use the streets is itself subject to the public necessity and convenience and whose profits are protected by state law. In sum, utilities such as respondent are seeking a windfall.

Prior to the decision of the Court of Appeals, courts dealing with the right of a utility to relocation benefits under the Relocation Act in situations akin to the subject case had uniformly refused to find any such right. See Consumers Power Co. v. Costle, 615 F.2d 1147 (6th Cir., 1980), aff'g 468 F. Supp. 375 (E.D. Mich., 1979); Artesian Water Co. v. State Dept. of Hwys. & Transp., 330 A.2d 432 (Del. Super. Ct., 1974), mod. on other grounds, 330 A. 2d 441 (Del., 1974); Lone Star Gas Co. v. Landrieu, No. 80-100-C (E.D.Okla., March 30, 1981); Public Service Co. of Oklahoma v. Harris, No. 79-C-37-BT (N.D. Okla., Aug. 22, 1980); Chesapeake and Potomac Telephone Co. of Virginia v. Landrieu, No. 81-1602 (E.D. Va., June 4, 1981) (the District Court opinion in this case); Mountain States Telephone & Telegraph Co. v. Boise Redevelopment

Agency, No. 52891 (Idaho Dist. Ct., Oct. 27, 1980), app. pending; See also, Pacific Telephone & Telegraph Co. v. Redevelopment Agency, supra, 87 Cal. App. 3d 296, 151 Cal. Rptr. 68, where a state relocation statute similar to the Relocation Act was held not to entitle a utility to payments for relocating its facilities in the absence of a specific provision therefore in the statute. While the decisions of these courts have pointed to different bases for holding the Relocation Act inapplicable,[8] the common thread joining all

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8. In Consumers Power Co. v. Costle, supra, both the District Court and the Court of Appeals found that the relocation of a utility's lines did not even constitute the acquisition of a property right necessary for application of the Relocation Act; see also, Lone Star Gas Co. v. Landieu, supra. In Artesian Water Co., supra, the Court held that the Relocation Act did not extend its coverage to utilities, and did not repeal 23 U.S.C., §123, which explicitly provides for reimbursement of legal, State payments for the relocation of utility facilities in connection with federally-aided highway construction.

these cases is the principle that, in light of the limited nature of a utility's right to place its facilities in the streets, relocation benefits should not be granted to a utility company forced to move such facilities in the absence of clear Congressional intent that they receive such benefits. See, e.g., Mountain States Telephone and Telegraph Co. v. Boise Redevelopment Agency, supra, No. 52891. Rather, as noted by the District Court in this case, the Congressional intent was to assist, inter alia, displaced businesses who must compete with other businesses not affected by governmental acquisition; it was not intended to assist public utilities who have a monopolistic franchise and whose rates are set by the State and may reflect any increased costs to them.

When Congress has intended that federal funds be used for the relocation of utility facilities, it has been quite explicit in stating so. Pursuant to 23 U.S.C., §123, Congress has provided

that where state funds are used to pay for the relocation of utility facilities in connection with federally assisted highway construction, federal funds can be used to reimburse the State for such payments, provided the payments are legal under state law. Furthermore, as pointed out in Artesian Water Co. v. State Dept. of Hwys. & Transp., supra, 330 A.2d at 438, the Relocation Act expressly repealed chapter 5 of Title 23 of the United States Code (Federal-Aid Highway Act of 1968, Public Law 90-495, Stat. 815, §30), itself a highway relocation assistance act which defined "displaced person" in a manner similar to the Relocation Act. However, 23 U.S.C., §123 was not so repealed, which underscores the different treatment afforded to utilities by Congress, and its intent to give them relocation assistance only where such assistance is specifically provided for in the relevant legislation. Similarly, in 1972, two years after passage of the Relocation Act, Congress passed the District of Columbia Public Utilities Reimbursement Act of 1972, which

explicitly provides for the reimbursement of the cost of relocating utility facilities in connection with urban renewal programs in the District of Columbia. Public Law 92-495, 86 Stat. 812. No such explicit provision for the reimbursement of utilities' relocation costs is present in the Relocation Act, and such reimbursement should not be required.

Accordingly, the legislative purpose and history of the Relocation Act, as well as its interpretation by the courts that have considered it, make clear that the respondent and other utilities whose facilities in the public way must be relocated in connection with urban renewal programs, are not entitled to benefits under the Relocation Act.

CONCLUSION

THE JUDGMENT OF THE COURT OF APPEALS SHOULD BE REVERSED.

Dated: New York, New York
April 1, 1983

Respectfully submitted,

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Docket No. 81-2332

In the Supreme Court of the United States

October Term, 1982

NORFOLK REDEVELOPMENT AND HOUSING AUTHORITY,
a political subdivision of the Commonwealth of Virginia,
Petitioner,

v.

THE CHESAPEAKE AND POTOMAC
TELEPHONE COMPANY OF VIRGINIA,
Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE FOURTH CIRCUIT

BRIEF OF THE CITY OF NORFOLK, VIRGINIA, AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether Congress, in passing the Uniform Relocation Act of 1970 [URA], intended to include utilities as "displaced persons" entitled to relocation for removing their facilities from public rights-of-way, thereby completely abrogating the universal common law rule that utilities bear the expense of relocating their facilities from public streets and placing a heavy financial burden on already beleaguered cities, despite the total lack of any indication of congressional intent to drastically change existing law?

TABLE OF CONTENTS

	PAGE
Interest of the amicus curiae . . .	1
Statement of the case	4
Summary of argument	6
Argument.	8
I. Under the classic rule of statutory construction, the Congress did not intend the URA to act in complete derogation of the common law because there is no clear indication of such intent.	8
II. The Fourth Circuit decision is contrary to those of every other federal and state court that has considered the issue.	23
III. The effect of the decision is to have the URA unconstitutionally impair contracts between cities and utility companies. . . .	26
IV. Congress did not intend the URA to impose a devastating financial burden on economically distressed cities and give a windfall to utilities that had already recouped relocation costs through their rate schedules.	31

PAGE

Conclusion 36

Appendix A A-1

Appendix B B-1

TABLE OF AUTHORITIES

Cases — Page

Alexander v. HUD, 441 U.S. 39 (1979).....8,16

Artesian Water Co. v. State Dept. of Highways & Transportation, 330 A.2d 432 (Supr. Ct.), aff'd as modified, 330 A.2d 441 (Del. 1974).....17, 23

Chesapeake & Potomac Telephone Co. v. Landrieu, No. 79-906-N (U.S.D.C., E.D. Va., June 4, 1981)(Appendix A).....6, 11 12, 14, 18

Chesapeake & Potomac Telephone Co. v. Landrieu, No. 81-1602 (U.S. Ct. App., 4th Cir., March 25, 1982)(Appendix B)..6, 13, 15

Connecticut Railway & Lighting Co. v. New Britain Development Comm'n, 161 Conn. 234, 287 A.2d 362 (1971).....12

Consumers Power Co. v. Costle, 615 F.2d 1147 (6th Cir. 1980), aff'g 468 F.Supp. 375 (E.D. Mich. 1979).....23, 24

Energy Reserve Group, Inc. v. Kansas Power & Light Co., 51 U.S.L.W. 4106 (January 24, 1983).....29

Lone Star Gas Co. et al. v. Landrieu, No. 80-100-C (U.S. D.C., E.D. Okla., March 30, 1981).....24

Mountain States Telephone & Telegraph Co. et al. v. Boise Redevelopment Agency, 101 Idaho 30, 607 P.2d 1084 (1980), on remand, No. 52891 (D.C. 4th Jud. D. Idaho, October 27, 1980).....23, 24 25, 29

Pacific Telephone & Telegraph Co. v. Redevelopment Agency, 151 Cal. Rptr. 68, 87 Cal. App. 3d 296 (1978).....12, 23, 25

Pennhurst State School & Hospital v. Halderman, 451 U.S. 1 (1981).....11

Potomac Electric Power Co. v. Fugate, 211 Va. 745, 180 S.E.2d 657 (1971).....28

Public Service Co. v. Harris, No. 79-C-37-3T (U.S.D.C., N.D. Okla., August 22, 1980).....24

Robert C. Herd & Co. v. Krawill Machinery Corp., 359 U.S. 297 (1959).....10

Whitner & Ferris v. City of Buffalo, 455 N.Y.S.2d 454 (N.Y. App. 1982).....9

Treatises

12 McQuillin Municipal Corporations § 34.74a (3d ed. 1970).....11

Statutes

Code of Virginia, 1950, as amended, §§ 25-235 et seq.....5

Code of Virginia, 1950, as amended, §36-55.25.....28, 29

Code of Virginia, 1950, as amended, § 56-460.....27

District of Columbia Public Utilities Reimbursement Act of 1972, Pub. L. No. 92-495, 86 Stat. 812 (October 14, 1972).....19

Federal Aid to Highways Act of 1958, 23 U.S.C. § 123.....16, 17, 18

Uniform Relocation Assistance and Real Property Policies Act, 42 U.S.C. §§ 4061 et seq.....4, passim

Rules

Rules of the United States Supreme Court

Rule 36.4.....1

Reports and Other Statutory History

115 Cong. Rec. 31, 533, 31, 534 (1969)(Statement of Sen. Edmond Muskie).....34

House Report No. 91-1656, reported in 1970 U.S. Code Cong. & Adminis. News at 5850-5852.....21

Regulations

Urban Renewal Handbook RHA § 7209.1.....22

No. 81-2332

IN THE
Supreme Court of the United States
OCTOBER TERM, 1982

NORFOLK REDEVELOPMENT AND HOUSING AUTHORITY, a political subdivision of the Commonwealth of Virginia,
Petitioner,

v.

THE CHESAPEAKE AND POTOMAC TELEPHONE COMPANY OF VIRGINIA,
Respondent.

On Writ of Certiorari
to the United States Court of
Appeals for the Fourth Circuit

BRIEF OF THE CITY OF NORFOLK, VIRGINIA, AS AMICUS CURIAE IN SUPPORT OF PETITIONER

INTEREST OF THE AMICUS CURIAE

This brief is filed on behalf of the City of Norfolk, Virginia, by its duly authorized legal officer pursuant to Rule 36.4 of this Court.

Petitioner, the Norfolk Redevelopment and Housing Authority [NRHA], has undertaken numerous federal- and city-financed urban renewal projects in Norfolk. The decision below that NRHA must pay Respondent Chesapeake and Potomac Telephone Company [C & P] for relocation costs that may reach a million dollars with interest for removing its facilities from streets affects the city directly. Although NRHA is a political subdivision of the Commonwealth of Virginia, independent of the city, any liability NRHA incurs ultimately will be borne by the city. Even if NRHA paid the judgment itself, it would do so from money otherwise available for redevelopment projects in Norfolk

Norfolk has been a showcase for urban renewal projects. From a decaying Southern port city, unable to adjust to

the burgeoning presence of the Navy following World War II, it has been rebuilt into a model for what federal funds, a committed citizenry, and local business initiative can achieve. Payment of this judgment, as well as of potential retroactive claims for all utility dislocations since 1970, could do much to stymie the remarkable progress of Norfolk, as well as that of numerous other cities reborn with federal funds. Those federal funds, already sharply curtailed by recent budget cuts, will be further depleted by any unexpected obligation to repay the enormous costs of moving utility facilities from streets. Such a reduction in development funds could deal a devastating economic blow to Norfolk, as to other core cities trying to rebuild deteriorating areas with increasingly scarce federal funds, in order to build up their tax bases by attracting

industries and businesses.

Although the City of Norfolk is not aware of any similar claim being filed by a utility company prior to the one filed by C & P, numerous claims have been filed or are expected to be filed since the Fourth Circuit's decision in the instant case. See the results of the questionnaire to its members, appendix, brief of amicus curiae, the National Institute of Municipal Law Officers [NIMLO].

STATEMENT OF THE CASE

Appellant C & P sued NRHA and the Secretary of HUD in the United States District Court for the Eastern District of Virginia for the costs of relocating their facilities from Norfolk city streets pursuant to a redevelopment plan financed with federal funds. C & P claimed that under the Uniform Relocation Assistance and Real Property Acquisitions Policies

Act [URA], 42 U.S.C. §§ 4061 et seq., and the corresponding Virginia act, Va. Code Ann. §§ 25-235 et seq., it was a "displaced person" and, as such, entitled to reimbursement for the cost of moving its underground telephone lines and equipment at the city's request. The city had ordered C & P to move its facilities from streets that the city planned to close or improve in connection with NRHA's redevelopment plans. The franchise agreement between the City of Norfolk and C & P's predecessor corporation provides that C & P will pay for moving its facilities at its own cost whenever the city so requests.

C & P's claim was made first to NRHA, which reviewed and denied it. After NRHA's denial was upheld by HUD's area office, C & P filed suit in the United States District Court for the Eastern District of Virginia. That court found

that Congress did not intend to include utility companies as "displaced persons" under the URA for the purpose of reimbursing them for the costs of moving their facilities from public streets. The District Court, therefore, denied all C & P's claims. Chesapeake & Potomac Telephone Co. v. Landrieu, et al., No. 79-906-N (U.S.D.C., E.D. Va., June 4, 1981)(Appendix A). C & P appealed to the Fourth Circuit, which reversed the lower court on March 25, 1982, declaring C & P to be a "displaced person" entitled to relocation benefits under the URA. Chesapeake & Potomac Telephone Co. v. Landrieu, et al., No. 81-1602 (U.S. Cir. Ct., 4th Cir., March 25, 1982)(Appendix B).

SUMMARY OF ARGUMENT

This Court should reverse the appellate court's interpretation of the URA as providing for reimbursement to utility

companies for removing their facilities from public streets for several reasons. First, it is based on a completely erroneous statutory interpretation of the Act as totally abrogating the common law, despite the lack of any indication of congressional intent to do so, which is contrary to basic principles of statutory interpretation. Second, the Fourth Circuit's decision is contrary to decisions by every other state and federal court that has considered the issue. Third, the decision interprets the URA as acting unconstitutionally in impairment of the contract, or franchise agreement, between the City of Norfolk and C & P by eliminating the city's contractual right to order C & P to remove its facilities from Norfolk's streets, at its own expense, an obligation C & P assumed in return for its rights to install those facilities without payment to the city.

Last, the decision could have a devastating, nationwide economic impact on cities by requiring them to pay millions in claims of utilities, unbudgeted and unplanned for, shifting funds away from the urgent needs of repairing decaying infrastructure and redeveloping blighted areas tc attract businesses and rebuild their tax bases.

ARGUMENT

I. UNDER THE CLASSIC RULE OF STATUTORY CONSTRUCTION, CONGRESS DID NOT INTEND THE URA TO ACT IN COMPLETE DEROGATION OF THE COMMON LAW BECAUSE THERE IS NO INDICATION OF SUCH INTENT.

The reach of the URA is very broad. It governs reimbursement to those displaced by almost all federally run or funded projects except for highways. This Court has examined it only a few times, most recently in Alexander v. HUD, 441 U.S. 39 (1979). That case makes

clear, however, that the Act is not intended to reimburse everyone displaced in any manner by a federally assisted program. It was intended to codify existing laws governing reimbursements for federally displaced persons and businesses, but not to create new rights of action.[1]

The Fourth Circuit, nevertheless, construed the URA as creating a new cause of action in utility companies that would reimburse them for removing facilities from public streets. This construction, however, would require the Court to conclude that Congress in passing the URA intended to totally abrogate the common law that denies such reimbursement to

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[1] At least one court has held that the URA did not create a private right of action by property owners against municipalities to collect relocation benefits provided for in the Act and, therefore, the aggrieved party can not sue the municipality to collect these benefits. Whitner & Ferris v. City of Buffalo, 455 N.Y.S.2d 454 (N.Y. App. 1982).

utility companies. There is no indication in the legislative history of the URA that Congress so intended and much to indicate the contrary.

The well-accepted rule of statutory construction is that a legislative body should not be assumed to have acted to overturn completely the existing common law without a clear indication by the legislature that it intended to so act. Robert C. Herd & Co. v. Krawill Machinery Corp., 359 U.S. 297 (1959). The history of the URA is devoid of any such indication. This rule should be applied most strictly where one party seeks to infer a congressional intent "to impose massive financial obligations on the states" upon which is contingent the receipt of federal funds by the states. Such an obligation should be so clearly stated that there remains no doubt that the state or local government understood the

financial responsibilities attendant on the acceptance of federal funds. Pennhurst State School & Hospital v. Halderman, 451 U.S. 1, 16-17 (1981).

The common law in Virginia, as in almost all the states, is that utility companies are not reimbursed for removing their facilities from public streets at the request of the municipality because the utilities enjoy no property rights in the public rights-of-way.[2] The understanding is that the city grants utility companies the right to place their facilities in public streets without any charge, on the condition that those facilities will be relocated at the expense of the utilities when the city so requests. This common law rule governing

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[2] Chesapeake & Potomac, No. 79-906-N, supra, & cases cited therein; 12 McQuillin, Municipal Corporations § 34.74a (3d ed. 1970).

placement and removal of utility lines and equipment for streets is so universally acknowledged that it can only be abrogated by clear statutory language to the contrary. Connecticut Railway & Lighting Co. v. New Britain Development Comm'n, 161 Conn. 234, 287 A.2d 362 (1971). This rule was stated clearly by the California Court of Appeals in discussing the import of the URA on existing common law:

> . . .[I]n the absence of a provision to the contrary, it has generally been held that a public utility accepts franchise rights in public streets subject to an implied obligation to relocate its facilities therein at its own expense when necessary to make way for a proper governmental use of the streets.

Pacific Telephone & Telegraph Co. v. Redevelopment Agency, 151 Cal. Rptr. 68, 69, 87 Cal. App. 3d 296 (1978). Accord, Chesapeake & Potomac, No. 79-906-N, supra.

Given the almost universal common law denying reimbursement to utilities for removing their facilities and applying the classic rule of construction that a statute will not be interpreted to act in complete derogation of the common law absent a clear expression of legislative intent to so act, the URA should only be read to change the common law on the subject if Congress expressed a clear intent to so act. The Fourth Circuit, however, ignored that rule of construction to give a literal reading to the Act's broad definition of "displaced persons" to include reimbursement to utilities for removing facilities because it found no indication one way or the other as to whether Congress intended to include them. Chesapeake & Potomac, No. 81-1602, supra. The rule of statutory construction, however, mandates the opposite approach: If there is no indication

one way or the other of legislative intentions, the assumption should be that a legislature would not seek to abrogate a long-standing common law rule without clearly indicating such purpose.

In contrast to this misreading by the Fourth Circuit, the District Court correctly construed the statute when it wrote:

> In the adoption of the Uniform Relocation Act of 1970, if Congress chose to abrogate such a well known common law principle, it would certainly have included in that legislation a clear affirmative statement of that revocation. Instead, no such reversal of the common law concept appears in the language of the Act or in its legislative notes and history.

Chesapeake & Potomac, No. 79-906-N, supra.

The error of the Fourth Circuit's reading is highlighted by one stated basis for its decision. The appellate court pointed out that the URA was in complete derogation of the common law as to

tenants-at-will by providing relocation payments for such tenants. Therefore, reasoned the court, the URA must similarly abrogate the common law as to utilities. Chesapeake & Potomac, No. 81-1602, supra. That logic ignores the vital distinction that the Act itself expressly provides for payments to tenants-at-will, 42 U.S.C. § 4624, while failing to mention utilities at all. In fact, the inclusion of tenants-at-will in the URA reinforces the city's point: That when Congress chooses to reverse a common law of long standing, such as it did in the case of tenants-at-will, it does so by expressly including them as it did by specifically providing for payments to tenants-at-will in the URA.

In contrast, the Act itself and its legislative history contain no reference to utilities. That fact alone should

leave the common law intact, but the context of the legislative history clarifies congressional intent to exclude utilities from URA benefits. The URA was an attempt to redraw the complex puzzle of diverse statutes and rules governing reimbusement to those displaced by federally aided programs and replace them with a uniform system of payments. Alexander v. HUD, supra. It was not intended to create new causes of action such as a major new right to reimbursement on the part of utilities.

Another contrast to Congress' failure to specify payment for utility relocations in the URA is offered by congressional inclusion of a specific provision in the Federal Aid to Highways Act of 1958 that provided for reimbursements to utilities for displaced facilities. Noticeably, that provision--§123--was one of the few provisions on

reimbursements for displacements by federal projects not repealed by the URA. Section 123 is explicit: Where allowed by state law, utility companies are to recoup their cost of relocating any utility facilities displaced by highway projects utilizing 90% federal funding. As the Delaware Supreme Court has written, to read the URA as including utilities "would render nugatory § 123 of the Federal Aid to Highways Act . . . ." Artesian Water Co. v. State Dept. of Highways & Transportation, 330 A.2d 432 (Supr. Ct.), aff'd as modified, 330 A.2d 441 (Del. 1974).

The District Court in the instant case provided further background against which congressional intent in passing the URA can be judged. That court pointed out that during congressional considera-tion of the URA a legal controversy had

arisen in Virginia, just across the river from Congress, involving payments to utilities displaced by federal highways and their reimbursement under § 123 of the Highways Act. That dispute "raised a real furor of intense and vocal interest" of which Congress certainly was aware when it voted on the URA:

> This contest was and is part of the public record and was prominently and contemporaneously in the foreground while passage of the Relocation Act of 1970 was before the Congress.

Chesapeake & Potomac, No. 79-906-N, supra.

The inclusion of utilities in a later Act of Congress makes it even clearer that the URA was not intended to include benefits for relocation of utility facilities. One of the state agencies listed as covered by the URA was the District of Columbia Redevelopment Agency, which, like the other state

agencies, was required by the URA to make relocation payments to persons or businesses displaced by federally funded projects. Sometime after the URA was passed in 1970, utility companies in the District of Columbia began to complain of being heavily burdened by the cost of relocating facilities displaced by federal projects. After thorough debate, therefore, Congress passed an Act, two years after the URA, that specifically provided for payments to utility companies whose facilities had been relocated as part of a federally funded project in the District of Columbia. District of Columbia Public Utilities Reimbursement Act of 1972, Pub. L. No. 92-495, 86 Stat. 812 (October 14, 1972). Had the URA already provided for such payments to utility companies for displaced facilities, that Act would have been

totally superfluous. It makes no sense to argue that Congress unnecessarily conducted a long study of and finally passed an Act to remedy a problem that had already been solved by the URA two years earlier. The only logical explanation is that Congress knew relocations of utility facilities were not covered by the URA and therefore passed an Act to compensate utilities for such displacements in the District of Columbia, leaving such displacements uncompensated outside the nation's capital.

Congressional intention not to disturb the common law rule that utilities bear the cost of moving their facilities from public streets is consonant with the primary purpose for which the URA was passed. The legislature wanted to alleviate the "inequitable burden" and "catastrophic results" of redevelopment

programs on "a few citizens," especially poor, non-whites, and small businesses. House Report No. 91-1656, reported in 1970 U.S. Code Cong. & Adminis. News at 5850-5852. Although reimbursement to businesses forced to absorb large moving expenses could fall within that overall aim, reimbursements to utility companies of millions of dollars for relocating their facilities does not fit logically within that scheme. Those persons and businesses to be reimbursed for moving personal property from redeveloped areas under the URA could not have anticipated such expenses. Utilities, on the other hand, traditionally expect to absorb the expense of moving their facilities and plan for such costs. Their rates are structured to allow them to recapture, as one of the costs of doing business, the expenses of removing

facilities from public streets.

The interpretation of the URA urged on this Court by NRHA and the City of Norfolk is the interpretation apparently given to the Act by HUD. Upon passage of the URA, Congress directed all federal agencies to issue any new guidelines necessary to implement the Act. Had HUD seen the URA as revising the law as to reimbursement to utilities for relocating their facilities, it would have revised its relevant guideline, Urban Renewal Handbook RHA § 7209.1, which was promulgated prior to the passage of the URA. Although other relevant HUD guidelines were rewritten, § 7209.1 was never revised by HUD.

II. THE DECISION OF THE FOURTH CIRCUIT IS CONTRARY TO THOSE OF EVERY OTHER STATE AND FEDERAL COURT THAT HAS CONSIDERED THE ISSUE.

Every court that has considered this subject, including the Sixth Circuit, has taken a position contrary to that of the Fourth Circuit. All state courts that have interpreted the URA or state statutes modeled on it have agreed that utilities were not meant to be reimbursed for moving their facilities from public streets. Pacific Telephone, supra; Artesian Water, supra; Mountain States Telephone & Telegraph Co. v. Boise Redevelopment Agency, 101 Idaho 30, 607 P.2d 1084 (1980). In addition, all other federal courts that have confronted the issue have reached a different result from that of the Fourth Circuit: Consumers Power Co. v. Costle, 615 F.2d 1147, 1149 (6th Cir. 1980), aff'g, 468

F. Supp. 375 (E.D. Mich. 1979); Lone Star Gas Co. et al. v. Landrieu, No. 80-100-C (U.S.D.C., E.D. Okla., March 30, 1981); Public Service Co. v. Harris, No. 79-C-37-3T (U.S.D.C., N.D. Okla., August 22, 1980).

C & P has sought to distinguish these cases on small differences in facts, but the thrust of all the cases is clear: Neither Congress nor any state legislature in passing state versions of the URA intended to completely overturn the long-standing common law rule that utilities absorb the costs of moving their equipment from public streets. In addition, two of the cases deal with facts almost identical to those in the instant case. In Mountain States, supra, the Idaho court denied that Congress included removal of utility facilities in the URA, writing:

> Given the stated intent of Congress to unify and coordinate the various federal relocation assistance programs, the state of the common law, and the consequent failure of Congress to clearly provide for the needs of the public utilities and their relocation requirements, it is the opinion of this Court that the U.R.A. was not intended to include within its coverage the reimbursement sought by the plaintiffs in this action.

In Pacific Telephone, supra, the California Court of Appeals wrote of the state version of URA:

> Appellant contends that these definitions are all inclusive and that appellant fits within them . . . [and] that since no provision of the Relocation Assistance Law specifically excludes reimbursement of utility costs, the broad general definitions indicate a legislative intent that the common law does not apply.
>
> We disagree. An attempt to exempt utilities from the common law cannot be inferred merely from the broad general definitions used in the Relocation Assistance Law.

Pacific Telephone, supra, at 70-71

(emphasis supplied)(citations omitted).

III. THE EFFECT OF THE DECISION IS TO HAVE THE URA UNCONSTITUTIONALLY IMPAIR CONTRACTS BETWEEN CITIES AND UTILITY COMPANIES.

The effect of the Fourth Circuit's interpretation of the URA is to have the statute act in impairment of the contractual agreement between the City of Norfolk and the predecessor corporation to C & P, in violation of the Contract Clause of the Constitution. The decision similarly would impair perhaps hundreds of such franchises between cities and utility companies that serve their residents. If another reasonable interpretation of the statute would allow it to be upheld, this Court should not give the URA a reading that would render it unconstitutional. The city submits that Congress never intended to impair existing

contracts unconstitutionally by mandating that cities reimburse utilities for removing their equipment and lines from public rights-of-way.

The franchise agreement between C & P's predecessor and Norfolk dates back to 1898. See joint appendix of Petitioner and Respondent. Virginia statute expressly allows cities to place such terms and restrictions as they wish on the right of telephone companies to place their facilities in public rights-of-way. Va. Code Ann. § 56-460. Norfolk's franchise with C & P also is consistent with the common law of the vast majority of states and other similar agreements throughout the country in its terms: The utility company may lay its lines in the public streets without paying any fees but in return it must remove those facilities from the streets at the city's

request at its own expense.[3] C & P's rights clearly are conditioned on its obligations. C & P has stipulated that its agreement requires it to move its facilities at its own expense where traffic considerations cause a street closure, but it protests that this is not the case where condemnation for urban renewal causes the closure. Nothing in the franchise agreement, however, limits the reasons for which the city may request C & P to remove its facilities. Removing urban blight and closing streets are both public purposes that fall within the city police powers. Va. Code Ann.

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[3] As recently as 1971, the Virginia Supreme Court reaffirmed that a franchise such as the one between the City of Norfolk and C & P, that allows a utility company to place its facilities in public streets, is revocable at will and confers no property rights on the utility company. Potomac Electric Power Co. v. Fugate, 211 Va. 745, 180 S.E.2d 657 (1971).

§ 36-55.25. See also Mountain States, supra.

In the recent case of Energy Reserve Group, Inc. v. Kansas Power & Light Co., 51 U.S.L.W. 4106 (January 24, 1983), this Court held that a Kansas act that prevented intrastate gas prices from escalating to the federal price ceiling did not impair unconstitutionally a contract between a gas supplier and a utility company. This Court found no substantial impairment in part because the parties knew their rights in a heavily regulated industry were subject to alteration by state price regulation. Here, in contrast, the city and C & P's predecessor had no knowledge of and no reason to anticipate that the federal government would step in and regulate a traditionally locally-controlled situation involving placement and removal

of utility lines in city streets. The impairment of the contract between C & P and Norfolk is not just substantial; it changes the entire relationship between the parties to the contract. C & P can still place its facilities in city streets without paying any fees, but it now gets paid for removing those facilities. The quid pro quo has been eliminated from the contract.

The fact that no utility before C & P had filed for such reimbursement under the URA demonstrates the widespread acceptance of NRHA's position prior to the Fourth Circuit decision in this case. Utility companies apparently assumed that the URA had not changed the common law until the Fourth Circuit's holding altered the situation drastically. According to the responses of member cities to a recent NIMLO questionnaire,

dozens of cities have received or expect to receive similar reimbursement claims following the appellate decision in the instant case.

IV. CONGRESS DID NOT INTEND THE URA TO IMPOSE A DEVASTATING FINANCIAL BURDEN ON ECONOMICALLY DISTRESSED CITIES OR TO GIVE A WINDFALL TO UTILITIES THAT ALREADY HAVE RECOUPED RELOCATION COSTS THROUGH THEIR RATE STRUCTURES.

The Fourth Circuit's decision could have a disastrous economic impact on cities all over the country. The consequences for cities of having to pay for unbudgeted and unplanned for claims worth millions are potentially devastating. Cities already must cope with economic problems thrust back on them by the federal government under the New Federalism policies. These problems are intensified by cuts in federal funds, the loss of businesses and the middle class, diminishing tax bases, a deteriorating

infrastructure, increasingly costly social programs, and growing numbers of social-welfare beneficiaries.

Retroactive claims from utility companies for relocating facilities dating back to 1970 that could reach billions of dollars threaten to worsen that economic plight and take money from other pressing problems. The potential liability for the City of Norfolk in this case alone could reach one million dollars with interest calculated from the mid-1970's. In addition, future claims could substantially lessen the worth of federal funds for community development projects to come, thereby hampering the ability of older cities to maintain themselves solvent financially.

The number of future utility relocation claims probably will increase with the greater competition among local telephone companies, long distance companies,

and other electronic information companies resulting from the recent divestiture of American Telephone and Telegraph Company. Because of antitrust implications for cities of recent decisions, cities will have difficulty denying these companies the right to place equipment in public rights-of-way. The future cost of paying a number of utility companies each time a city street is closed in connection with urban renewal could be staggering.

Older cities in particular need all the funds allocated by Congress for redevelopment to retain industries and businesses against the attractions of the suburbs and Sunbelt cities. The decision that millions should be shifted from available urban renewal funds allocated by Congress to pay utility relocation costs has far-reaching economic consequences for cities. Such a decision should be made by the legislature, not

by the courts.

Congress in 1970 was aware of the worsening plight of cities. A congressional intention to put such an economic burden on cities in need of community development funds is not consonant with the principal purpose of Congress in enacting URA of benefiting the urban poor and small businesses, that is, those upon whom the heaviest burden of urban redevelopment falls and "who are the least able to absorb these federal programs." 115 Cong. Rec. 31, 533, 31, 534 (1969) (Statement of Sen. Edmond Muskie). Utility companies such as C & P are able to absorb such losses because they anticipate displacement of facilities from city streets and include those anticipated losses in the rate proposals they present to the state rate-setting authority. Virginia's State Corporation

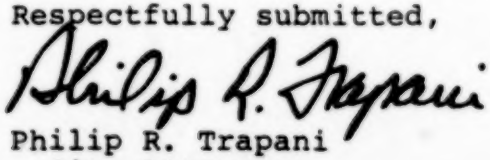
Commission factors many things into the rates it allows C & P to charge. The costs of removing facilities from public streets are spread out over several years, allowing C & P to fully recoup the expenses of relocation.

In contrast, the City of Norfolk neither anticipated nor appropriated funds to pay those costs. Covering a million dollars in unexpected and unanticipated costs is beyond the ordinary means of most cities for raising revenues through the tax structure. Because cities had no reason to expect claims for displacement of utility lines and equipment until the instant claim by C & P was upheld by the Fourth Circuit on March 25, 1982, it is doubtful that any cities have planned and budgeted for claims dating back to 1970.

CONCLUSION

The United States Supreme Court should reverse the decision of the Fourth Circuit in this case because it ignores a classic rule of statutory construction in treating an important federal statute as acting in complete derogation of state common law without a clear congressional intent to do so, is contrary to decisions of all other state and federal courts that have dealt with the issue, interprets the URA as acting to unconstitutionally impair the contract between C & P and Norfolk, and will place an unexpected and unplanned-for economic burden on the City of Norfolk and other economically hard-pressed cities.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that on this 1st day of April, 1983, three copies of the foregoing Brief Of The Amicus Curiae, The City Of Norfolk, Virginia, On Writ Of Certiorari In Support Of The Petitioner, were mailed, postage pre-paid, to each of the following:

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I further certify that all parties required to be served have been served.

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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Norfolk Division

THE CHESAPEAKE AND POTOMAC
TELEPHONE COMPANY OF VIRGINIA,

Plaintiff

v.

CIVIL
ACTION
NO. 79-906-N

MOON LANDRIEU, ETC., and
NORFOLK REDEVELOPMENT AND
HOUSING AUTHORITY,

Defendants

MEMORANDUM OPINION

The Chesapeake and Potomac Telephone Company of Virginia ("Telephone Company") here sues the Secretary of Housing and Urban Development ("HUD") and Norfolk Redevelopment and Housing Authority ("NRHA"), seeking reimbursement for the relocation of its telephone lines, cables, conduits, poles, and related equipment in

four federally-aided redevelopment projects in the City of Norfolk, Virginia. The central issue is the applicability of the provisions of the Federal Relocation Assistance Act, also known as the Uniform Relocation Act of 1970 ("URA"), 42 U.S.C. §§4601 et seq. The Virginia Legislature has adopted an enabling act to bring Virginia localities under the umbrella of the federal Uniform Relocation Act. See, §§25-235 et seq., Code of Virginia.

It is stipulated that the defendant NRHA acquired title to certain blighted areas in Norfolk for the purpose of redevelopment projects; that the land so acquired included streets in which the Telephone Company's lines and conduits were located; and that in the redevelopment of the areas the Telephone Company was required to relocate its utility equipment in accordance with the plan established for the redevelopment of

each pertinent area.

The statutes relied upon in the Telephone Company complaint are part of the Federal Relocation Assistance Act, 42 U.S.C. §§4601, 4622 and 4637, and read as follows:

> "4622. (a) Whenever the acquisition of real property for a program or a project...will result in the displacement of any person...the head of such agency shall make a payment to any displaced person...for - (1) actual reasonable expenses in moving himself, his family, business, farm operation or other personal property; (2) actual direct losses of tangible personal property as a result of moving or discontinuing a business or farm operation, but not to exceed an amount equal to the reasonable expenses that would have been required to relocate such property....
>
> "§4601. Definitions. As used in this chapter -
>
> (5) The term 'person' means any individual, partnership, corporation or association.

> (6) The term 'displaced person' means any person who...moves from real property, or moves his personal property from real property as a result of the acquisition of such real estate, in whole or in part, or as a result of the written order of the acquiring agency to vacate such real property, for a program or a project ....
>
> (7) The term 'business' means any lawful activity, excepting a farm operation conducted primarily -
>
> (a) for the sale of services to the public....
>
> "§4637. A person who moves or discontinues his business, or moves other personal property...as a direct result of any project or program...shall...be deemed to have been displaced as a result of the acquisition of real property."

HUD and NRHA, defendants, deny that the Uniform Relocation Assistance Act includes public utilities such as the Telephone Company or that the statutes are to be given the broad reading necessary to encompass the plaintiff's claim.

Concluding that utilities are not

included under the Uniform Relocation Act of 1970, we DENY the Telephone Company's request for reimbursement thereunder.

I

In the litigation of situations reasonably akin factually to those presented here, courts have been unanimous in denying such utility relocation claims. Consumer Power Company v. Costle, 615 F.2d 1147 (6th Cir. 1980), held that relocation benefit for a gas main which had to be relocated in a new right-of-way in a redevelopment project was denied; Pacific Telephone and Telegraph v. Redevelopment Agency of Glendale, 151 Cal. Rptr. 68, 87 Cal. App. 3d 296 (1978), under a State Act of the same language as the federal Relocation Act, the court found that a public utility accepts franchise rights

in public streets subject to an implied obligation to relocate those facilities at its own expense when necessary to make way for a redevelopment project relieving urban blight. Artesian Water Co. v. State Department of Highways and Transportation, 330 A.2d 432 (Del. 1974), held that the Uniform Relocation Act was not intended to extend coverage to include utilities within its definition of displaced persons or businesses. Mountain States Telephone and Telegraph Company v. Boise Redevelopment Agency, 607 P.2d 1084, 101 Idaho 30 (1980), stated that the overwhelming view in this country is that public utilities are not entitled to relocation costs incurred in making way for governmentally sponsored projects and the Uniform Relocation Act does not change this common law rule. To like effect, Public Service Company of Oklahoma v. Harris, No. 79-C-37-3T (N.D. Okla, August 22, 1980);

Lone Star Gas Company, etc. v. Moon Landrieu, No. 80-100-C (E.D. Okla., March 30, 1981).

These cases are ample authority, upon almost identical factual situations and with the same state and federal statutory overview that a private utility company is not a beneficiary for relocation expenses under the Uniform Relocation Act of 1970.

II

The common law has long been fully developed that utilities, shielded from competition by a franchise, accept their right to install utility lines in public rights-of-way thoroughly cognizant of their obligation to relocate such lines upon demand at no cost to the City, County or State. No authority for this obligation need be cited.

In Virginia during the period of the conception of the Uniform Relocation Act, the mid-1960's, relocation costs of utility lines, particularly in the expansion of highways, raised a real furor of intense and vocal interest both to the utilities attempting to collect reimbursement and to the Virginia Highway Department in its disclaimer of liability for such costs. Potomac Electric Power Company v. Fugate, 275 F.Supp. 566 (E.D. Va. 1967); PEPCO v. Highway Commissioner, 211 Va. 745, 180 S.E.2d 657 (1971); Potomac Power Electric Power Company v. Fugate, 341 F.Supp. 887 (1972); Potomac Elec. Power Co. v. Fugate, 574, F.2d 1163 (4th Cir. 1978). This contest was and is part of the public record and was prominently and contemporaneously in the foreground while passage of the relocation Act of 1970 was before Congress.

In the adoption of the Uniform Relocation Act of 1970 if Congress chose to abrogate such a well known common law principal, it would certainly have included in that legislation a clear affirmative statement of that revocation. Instead, no such reversal of the common law concept appears in the language of the Act nor its legislative notes and history. So also, in light of then ongoing litigation over relocation costs, had it been the intent of Congress to reimburse utilities for relocation costs in redevelopment projects, it appears that such intent most certainly would have been specifically stated in light of the fact that Congress had passed a special statute, the Federal Highway Aid Act in 1958, to give such relief to utilities relocating lines to accommodate the interstate highway system.

Lastly, public utilities retrieve their operating costs and the reasonable return on their investment from the general public in their franchise area through rates that are structured to accommodate costs and expenses. No other "persons," "corporations," or "displaced persons," except utilities are so protected by a franchise with a non-competitive market area.

The language of the Supreme Court in Alexander v. U.S. Dept. of HUD, 441 U.S. 39 (1979), indicates the thoroughness of the discussion of the Relocation Act before both the House of Representatives and the Senate Committee. Apparently, many witnesses appeared seeking to enlarge the umbrella of reimbursement to many classes of "displaced persons." No mention is made of any appearances before the Committees of Congress by utility representatives. In the end, as Alexander pro-

claims, the extension of relocation assistance was limited to a fairly narrow group and did not include utilities.

> "The structure of the Relocation Act confirms our conclusion that Congress did not expect to provide assistance for all persons somehow displaced by Government programs." Alexander, supra at page 60.

We believe that it is those unprotected, unfranchised corporations and persons which were contemplated by Congress under the Uniform Relocation Act. A utility company, C & P Telephone Company, serving these redeveloped areas under its franchise is not called upon to compete. Its rates are established by petitions to the State Corporation Commission which takes into consideration the accounting data essential to the life of the utility and fixes a rate to cover its costs and expenses. On the other hand, a Mom and Pop business, a grocery store, a retail

furniture outlet, for instance, which is subjected to the sudden trauma of being forced to relocate elsewhere must do so under competitive conditions in which it cannot realistically raise the price of its products to cover extraordinary relocation costs. It must compete in the market place against competitors beyond the redeveloped area who have no such cost to recoup. These are the "persons," "businesses," "displaced persons," to which the Uniform Relocation Assistance Act extends its largesse.

For the reasons herein stated, the plaintiff's prayer for relief is DENIED.

/s/ John A. MacKenzie
United States District Judge

Norfolk, Virginia
June 4, 1981.

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 81-1602

The Chesapeake and Potomac Telephone Company of Virginia,

Appellant,

versus

Moon Landrieu, in his official capacity as Secretary of Housing and Urban Development,

and

Norfolk Redevelopment and Housing Authority,

Appellees.

Appeal from the United States District Court for the Eastern District of Virginia, at Norfolk. John A. MacKenzie, District Judge.

Argued December 7, 1981

Decided March 25, 1982

Before HAYNSWORTH, Senior Circuit Judge, RUSSELL and WIDENER, Circuit Judges.

Joseph L. Kelly, Jack E. Greer (Williams, Worrell, Kelly and Greer on brief) for Appellant; Francis N. Crenshaw (Ann K. Sullivan, Crenshaw, Ware & Johnson; Justin W. Williams, United States Attorney, Michael L. Rhine, Assistant United States Attorney; Sonia C. Jaipaul, John R. Abbot, Peter M. Campanella on brief) for Appellees.

HAYNSWORTH, Senior Circuit Judge:

The questions are whether a utility company can qualify as a "displaced person" under the Uniform Relocation Assistance and Real Property Acquisition Policies Act, 84 Stat. 1894, 42 U.S.C. §4601 et seq., and whether the plaintiff, Chesapeake & Potomac Telephone Company (C&P), qualifies as a "displaced person" under the facts of this case.

The Department of Housing and Urban Development (HUD) provided funds for the Norfolk Redevelopment and Housing Authority (NRHA) to carry out certain redevelopment projects in Norfolk, Virginia. In

order to carry out these projects NRHA acquired title to certain blighted areas in Norfolk. Because of these projects, C&P was forced to move certain of its telephone lines, cables, conduits, poles and related equipment from what had been streets in Norfolk. Under C&P's franchise agreement with the City of Norfolk, C&P was required to move its lines from public rights-of-way whenever requested by the city to do so.

After moving its lines, C&P requested relocation benefits under the Uniform Relocation Act. C&P's claims were denied at the administrative level. C&P then brought this action in the district court against the Secretary of HUD and NRHA.

After a trial on the liability issue, the district court determined that Congress did not intend for utilities to qualify as displaced persons under the Act. The plaintiff appeals from this order.

I.

The Uniform Relocation Act defines "displaced person" as "any person who... moves... as a result of the acquisition of... real property... for a program or project undertaken by a Federal agency, or with Federal financial assistance...." 42 U.S.C. §4601(6). "Person" is defined as "any individual, partnership, corporation or association." 42 U.S.C. §4601 (5). "Business" is defined as "any lawful activity, excepting a farm operation, conducted primarily - - (A) for the purchase, sale, lease and rental of personal and real property, and for the manufacture, processing, or marketing of products, commodities, or any other personal property; (B) for the sale of services to the public...." 42 U.S.C. §4601(7). Under 42 U.S.C. §4622(a) "displaced persons" are entitled to recover from the government any reasonable expenses incurred in moving

personal property, and a business required to move is a displaced person.

The plaintiff argues that it is a business within the meaning of the Act and thus is entitled to claim reimbursement for expenses as a displaced person. NRHA and HUD argue, however, that the Act was not intended to apply to utilities. HUD bases its argument on the settled common law principle that utilities are not entitled to reimbursement for expenses incurred in moving lines when cities close streets. Because the Act does not explicitly mention utilities as parties that can receive benefits under the Act, and because the legislative history of the Act makes no mention of utilities, HUD argues that the Act was not intended to change the common law. We disagree.

HUD's reliance on the common law is unconvincing. The Act was intended to create rights that were not recognized at

common law. A tenant at will, for example, can recover relocation expenses as a displaced person under the Act even though the common law recognized no such right. The plaintiff in this case is, in certain respects, similar to a tenant at will because it has a right to use the city's streets for its lines only at the will of the city.

Congress' failure to mention utilities during the debates on the Act and in the legislative history of the Act also provides little reason to exclude utilities from the Act's coverage. In Alexander v. United States Department of Housing and Urban Development, 441 U.S. 39, 51 (1979), the Supreme Court noted that the original "Declaration of Policy" in S.1, 91st Cong., 1st Sess. §201(1969), the bill finally enacted as the Uniform Relocation Act, stated that the purpose of the legislation was

is a "displaced person" under the Act.

II.

HUD contends that the removal of its lines by C&P was not the result of federal acquisition of the real estate. It says that the removal was required by the city's closure of the streets.

Under the statute, relocation expenses are payable if the removal was required "as a result of the acquisition of... real property, in whole or in part..., for a program or project undertaken by a Federal agency, or with Federal financial assistance...." It is true that the city closed the streets, but the removal seems clearly to have been required as a result of the federal acquisition of the real estate.

With respect to most of the relocation costs incurred by C&P, they occurred in situations in which NRHA acquired the land abutting both sides of streets. As

> "to establish a uniform policy for the fair and equitable treatment of owners, tenants, and others displaced by the acquisition of real property in Federal and federally assisted programs to the end that such person shall not suffer disproportionate injuries as a result of programs designed for the benefit of the public as a whole."

Similar language is contained in the House Report, H.R. 91-1656 (1970). Thus the Act was intended to extend benefits uniformly to persons who are displaced by federal acquisitions of real property for federal programs. Exclusion of utilities from the Act's coverage would run counter to that purpose.

In the absence of any clear legislative intent to exclude utilities, it is this court's duty to apply the literal language of the statute. Doing so, we find that a utility comes within the Act's definition of "business" and thus

a result of those acquisitions, the project became the owner of the title in fee simple to the land underlying the streets, subject to the city's easement to maintain them as public ways. At the request of NRHA, the city then released its easements so that NRHA became the owner of the land formerly dedicated to use as streets without the burden of that servitude. While in a very technical sense it may have been the city that closed the streets, the city was acting at the direction or request of HUD and NRHA. It was an essential part of the plan of the project that the land occupied by the streets to be closed be acquired free of the city's easement so that such land could be incorporated in the redevelopment plan to the same extent as lands acquired, by purchase or condemnation, from private owners. It was the federal acquisition of the streets, an integral part of the redevelopment plan,

which required removal of C&P's lines.

Some of the removal expense was incurred with respect to lines in streets that were to be widened and other streets which were only partially closed. The record is not sufficient to permit us to decide whether those expenses resulted in whole or in part from the federal acquisition. This should be the subject of further consideration on remand.

III.

Under 42 U.S.C. §4622(a), it is the expense of removal of personal property which is reimbursable, and HUD contends that the utility lines were realty. Its regulations require that what is personal property be determined according to the law of the state in which the property is located,[1] and it relies upon Transcontinental Gas Pipe Line v. Prince William County, 210 Va. 550, 555, 172 S.E.2d 757,

1. 24 C.F.R. §42.40(m)(2).

761-62(1970).

In Transcontinental, gas pipe lines had been installed in land in which Transcontinental had a perpetual easement for the placement, maintenance and operation of the gas line. The easement was unquestionably real property, belonging to the owner of the lines. Unde those circumstances, the Virginia Supreme Court held that the gas lines themselves were real estate belonging to Transcontinental. In so doing, it held that the question whether a chattel annexed to real estate has been converted into a fixture principally depends upon the intention of the party making the annexation.

C&P, in placing its lines, could hardly have intended them to become so annexed to real estate belonging to others that the lines themselves became the real property of those other owners. Clearly it intended to maintain ownership and control of these lines which were not

annexed to any real estate owned by C&P of which they might have become a part. Indeed, everyone recognized C&P's right of removal of property which could only have been its personalty.

In similar situations in which a utility's facilities were installed or attached to real estate belonging to others, state courts have found that the facilities remained personal property. See Bangor-Hydro Electric v. Johnson, 226 A.2d 371 (Me. 1967); United Electric Light v. Deliso Const. Co., 52 N.E.2d 353 (Mass. 1943).

HUD and NRHA, however, point to a letter that C&P wrote to the Virginia Commissioner of Revenue requesting that its property be taxed as real property. That it wished its facilities to be treated for purposes of ad valorem taxation as if they were realty is not inconsistent with an intention at the time of

installation that the facilities remain its personal property subject to its control and possible removal. Indeed, if the facilities had become part of the real estate to which they were attached, C&P should have been subject to no ad valorem taxation upon them, for they would not have been the property of C&P.

This result is consistent with the purpose of the personal property limitation. The former owners of land acquired for the redevelopment project are compensated through a purchase agreement or a condemnation proceeding. By agreement, there might be a severance of a fixture and its reconversion to personalty, but once real estate has been sold and paid for, it is no longer subject to removal by the former owner. The Act thus contemplates no reimbursement of expense in connection with the removal of non-removable real estate. It is limited to the expense

of removal of personal property, for the owner is not otherwise compensated for that expense. There is no possibility of double compensation here, for C&P did not sell any land, and it received no compensation through any sale or condemnation.

IV.

We reverse and remand this case for further proceedings consistent with this opinion.

REVERSED AND REMANDED

MOTION FILED
APR 1 1983

No. 81-2332

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

NORFOLK REDEVELOPMENT AND HOUSING AUTHORITY, A POLITICAL SUBDIVISION OF THE COMMONWEALTH OF VIRGINIA,

Petitioner,

v.

THE CHESAPEAKE AND POTOMAC TELEPHONE COMPANY OF VIRGINIA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE AND BRIEF AMICI CURIAE OF THE UNITED STATES CONFERENCE OF MAYORS, THE NATIONAL GOVERNORS' ASSOCIATION, THE STATE OF WISCONSIN AND THE NATIONAL ASSOCIATION OF COUNTIES IN SUPPORT OF PETITIONER

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

No. 81-2332

NORFOLK REDEVELOPMENT AND HOUSING AUTHORITY, A POLITICAL SUBDIVISION OF THE COMMONWEALTH OF VIRGINIA,

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THE CHESAPEAKE AND POTOMAC TELEPHONE COMPANY OF VIRGINIA,

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MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE OF THE UNITED STATES CONFERENCE OF MAYORS, THE NATIONAL GOVERNORS' ASSOCIATION, THE STATE OF WISCONSIN AND THE NATIONAL ASSOCIATION OF COUNTIES IN SUPPORT OF PETITIONER

Pursuant to Rule 36 of the Supreme Court of the United States, the U.S. Conference of Mayors, the National Governors' Association, the State of Wisconsin and the National Association of Counties hereby move for leave to file a brief *amici curiae* in the above-captioned proceedings, and in support thereof state:

1. The decision of the U.S. Court of Appeals for the Fourth Circuit, in providing relief to Respondent, appears deficient in its analysis of the relationship of the common law to the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, 42 U.S.C. §§ 4601 *et seq.*, in that it misreads both the language of the Act and the intent of Congress as they relate to matters in derogation of the common law.

2. The decision will have far reaching consequences for the States and Territories and for the cities and counties of America, virtually all of which have undertaken significant economic and community development projects which included the use of federal grant-in-aid funds to effect their result. If allowed to stand, the decision below may well result in vast, new and unanticipated liabilities which included the use of federal grant-in-aid funds to

3. The Fourth Circuit's decision reflects a substantial change in the construction of the Act, and *amici* intended to demonstrate in their brief that the decision conflicts with notions of cooperative federalism.

4. This case presents important issues of law of direct and immediate concern to the members of *amici*, the fifty States, the Territories and the nation's cities and counties.

5. Accordingly, the *amici* seek this opportunity to make known their views to the Court and to attempt to assist the Court in its review of the merits of this case.

6. Counsel for *amici curiae* has sought, but was unable to secure, consent to file the attached brief *amici curiae* from Respondent.

Counsel for *amici curiae* hereby requests that the Court grant this Motion to File Brief *Amici Curiae* of the U.S. Conference of Mayors, the National Governors' Association, the State of Wisconsin and the National As-

sociation of Counties, and that the attached brief be accepted as part of the record in this case.

Respectfully submitted,

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
BRIEF AMICI CURIAE OF THE UNITED STATES CONFERENCE OF MAYORS, THE NATIONAL GOVERNORS' ASSOCIATION, THE STATE OF WISCONSIN AND THE NATIONAL ASSOCIATION OF COUNTIES	1
THE INTEREST OF THE AMICI CURIAE	1
SUMMARY OF THE ARGUMENT	4
ARGUMENT	5
I. Congress adopted the URA to benefit persons and businesses who were disproportionately injured by relocation. Because public utilities already have unique legal procedures and privileges protecting their interests, Congress did not intend to provide them with relocation benefits	5
II. The decision of the Fourth Circuit will have highly adverse, unforeseen consequences for State and local governments and for the intergovernmental system	9
CONCLUSION	13

TABLE OF AUTHORITIES

CASES Page

Alexander v. U.S. Department of Housing and Urban Development, 441 U.S. 39 (1979) 6

Chesapeake & Potomac Telephone Co. v. Landrieu (U.S.D.C., E.D. Va., 1981, Reprinted in Pet. Cert., pp. B 1-12) 7

Mountain States Telephone and Telegraph Co. v. Boise Redevelopment Agency, 101 Idaho 30, 670 P.2d 1084 (1980) 8

New Orleans Gaslight Co. v. Drainage Commissioner of New Orleans, 197 U.S. 453 (1905) 8

North Dakota v. United States, —— U.S. ——, 51 U.S.L.W. 4240 (1983) 9, 10

Pennhurst State School and Hospital v. Halderman, 451 U.S. 1 (1981) 10, 11, 12

Rothstein v. Wyman, 467 F.2d 226 (CA 2, 1972) 12

STATUTES

Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, 42 U.S.C. §§ 4601 *et seq.* ..... *passim*

District of Columbia Public Utilities Reimbursement Act of 1972, P.L. 92-496, 86 Stat. 812 8-9

Federal Aid Highway Act of 1958, 23 U.S.C. § 123 9

OTHER SOURCES

H. Rep. No. 91-1656, reprinted at 1970 U.S. Code Cong. and Admin. News, p. 5850 ..... 6, 7, 8, 11

McQuillin, *Municipal Corporations* (3rd ed. 1970) .. 8

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

No. 81-2332

NORFOLK REDEVELOPMENT AND HOUSING AUTHORITY, A POLITICAL SUBDIVISION OF THE COMMONWEALTH OF VIRGINIA,

Petitioner,

v.

THE CHESAPEAKE AND POTOMAC TELEPHONE COMPANY OF VIRGINIA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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BRIEF AMICI CURIAE OF THE UNITED STATES CONFERENCE OF MAYORS, THE NATIONAL GOVERNORS' ASSOCIATION, THE STATE OF WISCONSIN AND THE NATIONAL ASSOCIATION OF COUNTIES IN SUPPORT OF PETITIONER

THE INTEREST OF THE AMICI CURIAE

The *amici*, the U.S. Conference of Mayors, the National Governors' Association, the State of Wisconsin and the National Association of Counties, represent State and local governments throughout the United States. In addition to their concern over the substantial effect the decision below will have on the City of Norfolk and its Redevelopment and Housing Authority, the *amici* are troubled that State and local governments in all parts

of the United States will be facing claims, both retroactive and current, for relocation assistance from public utilities. This development, resulting solely from the interpretation of the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 by the United States Court of Appeals for the Fourth Circuit, is at variance with long lines of cases under the common law and will effectively obviate long-settled patterns and practices established by State legislatures for the allocation of costs for relocation of public utility facilities between taxpayers and ratepayers through the use of legislative oversight authority over municipalities and public utility rate setting commissions.

The decision below will bring about a fundamental change in the interpretation of federal and State law and responsibilities. Major changes in intergovernmental responsibilities should not occur without some clearer statement of Congressional intent. The re-channeling of funds dedicated to various public purposes to pay unanticipated relocation costs for public utilities will cause undue hardship to State and local government budgets in a time when they are under severe fiscal distress.

This change, and the retroactive and current costs associated with it, and the loss of State and local control over important aspects of public utility franchising, will adversely affect the fifty States, the Territories and the nation's cities and counties. Accordingly, the *amici* seek to represent the interests of their members in this case. A detailed statement as to each *amicus* follows:

The United States Conference of Mayors: The Conference is an organization of city governments represented through their chief elected officials, Mayors. It was organized in 1932 to promote the causes of the cities and to foster responsible, informed and effective relationships between city halls and the federal government. By limiting its membership to cities of over 30,000 in population, the Conference of Mayors represents the needs of

larger cities. Of the 800 cities eligible for membership in the Conference, over 480 are full members, including virtually all cities of over 100,000 in population. Petitioner, NORFOLK REDEVELOPMENT AND HOUSING AUTHORITY, works closely with the city and Mayor of Norfolk, Virginia. The City of Norfolk is a full and active member of the Conference of Mayors and the Mayor of Norfolk, Vincent J. Thomas, serves as chairman of the Conference's standing Committee on Community Development, Housing and Economic Development.

The National Governors' Association: NGA is an incorporated instrumentality of the States, whose members are the chief elected officials of the fifty States, the Commonwealth of Puerto Rico, the Commonwealth of the Northern Mariana Islands, and the territories of the Virgin Islands, Guam and American Samoa. The National Governors' Association joins this *amici* brief on behalf of all its members, and is specifically joined by the State of Wisconsin.

The Governors' Association is concerned about the impact that the novel decision of the Fourth Circuit will have nation-wide as the URA affects some fifty federal programs administered by over twenty federal agencies. In addition, some forty-one States have adopted relocation statutes similar to the URA, or permit compliance with the terms of the Act.

The State of Wisconsin by its Attorney General: The State has an interest in the determination of this case as it affects the State both in its sovereign role as a direct participant in rural and economic development and in State road and park and recreation programs, among others. The State also files on behalf of the interest of its cities, counties and other local governments that could be adversely affected by the decision below. The State is concerned about the possible unforeseen and unconsidered consequences of the Fourth Circuit's decision which runs

directly counter to the State's legislative policy of cooperative and joint uses of public rights-of-way under franchises, permits and agreements.

The National Association of Counties: NACo is the only national organization representing county government in the United States. Its membership spans the spectrum of urban, suburban and rural counties which have joined together for the common purpose of strengthening county government. NACo member county governments cover over 85% of the U.S. population. Counties, much like cities and States, undertake a vast array of development projects that are supported, in part, by federal program funds. As such, the Fourth Circuit's construction of the URA would have disruptive and costly impacts on county governments.

SUMMARY OF ARGUMENT

The United States Fourth Circuit Court of Appeals has held that monopoly public utilities can be "displaced persons" within the meaning of Title II of the Uniform Relocation Assistance Act ("URA"). The decision misreads the structure and intent of the URA. In enacting Title II of URA, Congress only intended to create rights, in derogation of common law, for persons suffering "disproportionate injuries" because of federally financed activities. Monopoly public utilities do not suffer such injuries.

1. Congress never intended that *all* parties displaced by federal activities should be entitled to relocation assistance. Congress intended only to protect persons on whom relocation was particularly burdensome. When Congress has intended to protect public utilities, as it has under other statutes, it has explicitly stated that intent. There is no such statement in Title II.

2. The Fourth Circuit's decision reflects serious misconceptions of the role that the URA plays in the inter-

governmental system. It conflicts with the URA's fundamental statutory objective of promoting cooperation, certainty and predictability in intergovernmental programming. The decision also reverses established law and practice governing the relationships between State and local governments and monopoly public utilities. It will lead to inestimable retroactive and prospective costs that will take dollars from the fulfillment of other public purposes and will disrupt planning and financing of needed public works and redevelopment.

Congress, which made no statement indicating that monooply public utilities should be covered by the URA, cannot by its silence have willed such coverage when the result would be a drastic reallocation of public resources from vital governmental purposes to monoply public utilities.

ARGUMENT

I. CONGRESS ADOPTED THE URA TO BENEFIT PERSONS AND BUSINESSES WHO WERE DISPROPORTIONATELY INJURED BY RELOCATION. BECAUSE PUBLIC UTILITIES ALREADY HAVE UNIQUE LEGAL PROCEDURES AND PRIVILEGES PROTECTING THEIR INTERESTS, CONGRESS DID NOT INTEND TO PROVIDE THEM WITH RELOCATION BENEFITS.

A. The City of Norfolk, and the Norfolk Redevelopment and Housing Authority, undertook an urban renewal project in 1975. Pursuant to that project, transmission lines and equipment of the Chesapeake and Potomac Telephone Company of Virginia ("C. & P."), were transferred from one publicly owned right-of-way, to which the Company had received free access, to another publicly owned right-of-way, to which it also received free access. In this case C. & P. seeks relocation payments under Title II of the Uniform Relocation Assistance Act ("URA"), 42 U.S.C. §§ 4601 *et seq.*, because of the transfer from one

free right-of-way to another. It asserts that this transfer made it a "displaced person" under 42 U.S.C. § 4601(6).

C. & P.'s argument is without merit. In its recent decision in *Alexander v. U.S. Department of Housing and Urban Development*, 441 U.S. 39 (1979), this Court ruled that, in enacting the URA, "Congress did not expect to provide assistance for all persons somehow displaced by Government programs." 441 U.S. at 60. Here, Congress "did not expect to provide [relocation] assistance" payments to utilities which operate in monopoly markets and recoup their costs through state sanctioned rate structures. Rather, Congress intended to provide relocation assistance to individuals and small businesses who suffer "disproportionate injuries" from forced relocation, 42 U.S.C. § 4621.

That individuals and small businesses which are disproportionately harmed are the intended beneficiaries of Congress' effort is manifested in the legislative history of the URA. The House Report stressed that governmental programs had placed inequitable and even catastrophic burdens on some citizens in urban areas:

> . . . As the thrust of the Federal and federally assisted programs have shifted from rural to urban situations, it became increasingly apparent that the application of traditional concepts of valuation and eminent domain resulted in inequitable treatment for large numbers of people displaced by public action. When applied to densely populated urban areas, with already limited housing, the result can be catastrophic for those whose homes or business must give way to public needs. The result far too often has been that a few citizens have been called upon to bear the burden of meeting public needs.

The Report went on to state that Congress was providing humanitarian assistance to those in need.

> It provides a humanitarian program for relocation payments, advisory assistance, assurance that comparable, decent, safe, and sanitary replacement hous-

> ing will be available for displaced persons prior to displacement, economic adjustments, and other assistance to owners and tenants displaced from their homes, farms and places of business. . . . And, perhaps most important of all, it gets to the heart of the dislocation problem by providing the means for positive action to increase the available housing supply for displaced low and moderate income families and individuals. H.Rep. No. 91-1656, reprinted in 1970 U.S. Code Cong. and Admin. News, pp. 5851-2.

The trial court recognized that Congress intended to assist individuals and small businesses, not monopoly public utilities which recoup their costs through their rates.

> We believe that it is those unprotected, unfranchised corporations and businesses which were contemplated by Congress under the Uniform Relocation Act. A utility company . . . serving these redeveloped areas under its franchise is not called upon to compete. Its rates are established by petitions to the State Corporation Commission which takes into consideration the accounting data essential to the life of the utility and fixes a rate to cover its costs and expenses. On the other hand, a Mom and Pop business, a grocery store, a retail furniture outlet, for instance, which is subjected to the sudden trauma of being forced to relocate elsewhere must do so under competitive conditions in which it cannot realistically raise the price of its products to cover extraordinary relocation costs. It must compete in the market place against competitors beyond the redeveloped area who have no such cost to recoup. These are the "persons," "businesses," "displaced persons," to which the Uniform Relocation Assistance Act extends its largesse." *Chesapeake & Potomac Telephone Company v. Landrieu* (U.S.D.C., E.D. Va., 1981, Reprinted in Pet. Cert., pp. B 1-12, at 11 and 12.)

As pointed out by the trial court, there is a major contrast between public utilities on the one hand, and the persons and small businesses which Congress sought to protect on the other. Public utilities have monoply

markets with guaranteed rates of return, access to public rights-of-way when relocating and ample financial resources with which to relocate. Individuals and small businesses that Congress wished to aid lack the resources needed to move or to secure adequate replacement quarters. Congress intended only to ameliorate the intractable conditions faced by those who lacked resources.

B. That Congress did not feel it necessary, and did not intend, to aid utilities is emphasized because it legislated against a known background of common law and State statutory rules that already provided valuable protections for utilities. Several studies commissioned by Congress and a select committee on relocation assistance had studied this background, under which utilities receive free access to rights-of-way, recovery of costs through rate structures and, in some cases, even relocation payments.[1] (A short history of Congressional review of relocation problems is found in the legislative history, H.Rep. No. 91-1656, 1970 U.S. Code, Cong. and Admin. News, p. 5851); and see, *Mountain States Telephone and Telegraph Co. v. Boise Redevelopment Agency*, 101 Idaho 30, 607 P.2d 1084 (1980); *New Orleans Gaslight Co. v. Drainage Commissioner of New Orleans*, 197 U.S. 453 (1905); and 12 McQuillin, *Municipal Corporations*, § 34.74a (3rd ed. 1970). In the URA, Congress manifested no desire to affect the state common law and statutory matrix concerning relocation payments to public utilities. To the contrary, Congress intended to leave to States the decision on whether utilities should receive such payments. Thus it was that, after enacting the URA, Congress, acting as the local legislature for the District of Columbia, specifically enacted a law providing that District of Columbia utilities shall receive relocation payments. D.C. Public Utilities Reimburse-

[1] This combination of benefits is obtained by no other type of business. The situation of utilities thus differs from that of any other industry.

ment Act of 1972, P.L. 92-495, 86 Stat. 812. Such law was wholly superfluous if the URA already mandated these payments. Moreover, when Congress acting as the national legislature *has* intended to affect relocation payments to utilities, it has explicitly stated its desire. For example, in the Federal Aid Highway Act of 1958, 23 U.S.C. § 123, Congress explicitly stated that federal monies could be used to "pay for the cost of relocation of utility facilities." There is no comparable statement in the URA. The lack of a comparable statement evinces a lack of comparable intent.[2]

In conclusion, after years of study, Congress adopted a scheme for paying relocation assistance that preserves the common law with regard to utilities. The Court should be hesitant to rule that a well informed Congress, by its silence in the URA, sought to effect a wholesale revision in the common law concerning utility relocation payments. There is no meaningful construction of the term "displaced person" which includes utilities and meshes with traditional common law rules. Nor, as previously shown, is there any meaningful construction of the term "disproportionate injuries" which can include businesses with the rights and benefits enjoyed by monopoly public utilities.

II. THE DECISION OF THE FOURTH CIRCUIT WILL HAVE HIGHLY ADVERSE, UNFORESEEN CONSEQUENCES FOR STATE AND LOCAL GOVERNMENTS AND FOR THE INTERGOVERNMENTAL SYSTEM.

A. The Court has just this Term recognized that large-scale federally supported programs require certainty, predictability and continuity. In *North Dakota v.*

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[2] It is noteworthy that, though Congress explicitly provided in the 1958 Act that federal monies *could* be used for relocation payments to utilities, it nonetheless left it to State common law and statutes to determine whether monies *would* be used for this purpose. It thus recognized, as is re-echoed in the URA, that the decision on relocation payments to utilities is a State decision.

United States, —— U.S. ——, 51 U.S.L.W. 4240 (1983), the Court noted that a comprehensive program "could not take place overnight; careful planning over many years was anticipated. . . . A detailed federal program involving the estimate of needs, setting of priorities, allocation of funds, and negotiations with landowners," should not be subject to interpretations which would negate the purposes of the statute. 51 U.S.L.W. at 4244.

These requirements are equally applicable to the large-scale redevelopment projects affected by the URA. The State or local agency undertaking such a project must be able to proceed with certainty and predictability in planning, financing and implementation of the program. The URA has contributed to all of these purposes. It is for this reason that *amici*, and their members, Mayors, Governors and County Officials, have consistently supported the URA. The decision of the Fourth Circuit, however, will have a particularly disruptive impact on the planning and financing of redevelopment projects.

First, there is no statute of limitations in the URA. Thus, utilities will be able to seek reimbursement for projects that were drawn up as long ago as 1970. This retroactivity will upset long established plans, and will thereby create great, unforeseen financial hardships for States and cities which have completed redevelopment projects and which are unable to apply for additional federal funds to pay the utilities' relocation expenses.[3]

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[3] Had cities such as Norfolk suspected that they might have to make large relocation payments to utilities, they would have planned for this *ab initio* by seeking additional funds, reducing the total size of the project or other measures. But no one having envisioned the possibility of payments to utilities, the planning and financing process took no account of such expenditures; yet now, cities and States will be saddled with large and disruptive liabilities. Cf., *North Dakota v. United States*, *supra*, at 4244; *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1, at 24 (1981).

The same disruptive results will obtain for projects which are currently in progress but for which it is too late for States and cities to apply for additional federal funds because the financing process is closed. And, uncertainty will attend even those current projects for which it is still possible to apply for more funds: whether federal funds will, in fact, be available is unclear, and it is thus uncertain whether States and cities will have to reduce the total size of renewal projects, and/or increase their own financial contributions, in order to make monies available for relocation payments to utilities.

Second, Congress clearly intended that the URA help effectuate the goals of other federal programs. See, H. Rep. No. 91-1656, *supra*, 1970 U.S. Code Cong. and Admin. News at 5852. The unforeseen result of the Fourth Circuit's decision, however, will be to siphon funds that otherwise would be used to carry out other public purposes and programs from grant programs or from State and local treasuries to recompense public utilities for moving from one free public right-of-way to another free public right-of-way.

B. This Court's recent decision in *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1 (1981) is instructive in this case. In *Pennhurst* the Court interpreted a statute that "was designed as a cooperative program of shared responsibilities" between the federal government and State and local governments. 451 U.S. at 22, citing *Harris v. McRae*, 448 U.S. 297. The Court stressed a respect for the principles of federalism and recognized that States possess a right to choose the extent of their involvement in federal programs. It thus held that, if Congress intends to saddle States with large, indeterminate liabilities when they participate in a program, then it must explicitly state the conditions attached to the program. 451 U.S. at 24.

The need for a more definite Congressional statement is even more compelling here than under the statute re-

viewed in *Pennhurst*. The URA is an obligatory program attaching to virtually all federal grants, but no new or additional funds are provided to grant recipients under the URA to comply with its terms. It merely authorizes the expenditure of federal funds from other grant programs. In *Pennhurst*, at least some funds were available to the States under the statute at issue to effect the statute's goals. Here, States and local governments will be required to supply most of the funds. If Congress had intended this result, it should have stated that requirement explicitly. *Pennhurst, supra*; cf. *Rothstein v. Wyman*, 467 F.2d 226, 235 (CA 2, 1972) *cert. den.*, 411 U.S. 921 (1973).

As shown above, in Title II of the URA Congress intended to help the truly needy. It knew the common law and statutory rules regarding relocation payments to utilities, and gave no indication of a desire to change this matrix. Until C. & P. sought relocation payments, utilities did not seek reimbursement under the URA. Until the Fourth Circuit's decision, it was not thought that such reimbursement could be had. Planning and financing proceeded under the opposite assumption. The Fourth Circuit's decision, twelve years after the URA was enacted, will produce great financial disruption for State and local governments and will siphon funds that otherwise would be used for statutorily expressed public purposes.

Such results as these are in direct conflict with the teachings of *Pennhurst*. The Court there said that Congress "must speak with a clear voice [so as to] enable States to exercise their choice knowingly, cognizant of the consequences of their participation." 451 U.S. at 22. There is no such clear statement supporting the position espoused by Respondent.

CONCLUSION

For all the foregoing reasons, the Court of Appeals' decision in this case should be reversed by this Court.

Respectfully submitted,

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Dated: April 1, 1983

NO. 81-2332-CFX	TITLE	Norfolk Redevelopment and Housing Authority, etc., Petitioner v. Chesapeake and Potomac Telphone Company of Virginia, et al.

DOCKETED	COURT
June 22, 1982	United States Court of Appeals for the Fourth Circuit

DATE	PROCEEDINGS AND ORDERS
	Counsel for Petitioner: Francis N. Crenshaw
	Counsel for Respondent:
June 22, 1982	Petition for writ of certiorari filed. (Record filed).
July 21, 1982	Brief, amicus curiae, of the Corporation Counsel of the City of Albany, New York filed.
July 22, 1982	Brief, amicus curiae, of the Boston Redevelopment Authority in support of the petition filed.
July 22, 1982	Brief, amici curiae, on behalf of The Community Redevelopment Agencies of the City of Los Angeles, et al. filed.
July 22, 1982	Motion of United State Conference of Mayors for leave to file a brief as amicus curiae filed.
July 21, 1982	Brief, amicus curiae, of The City of Norfolk, Virginia, filed.
July 21, 1982	Brief for the respondent in opposition filed.
July 23, 1982	Waiver of right by the Government to file a response to the petition filed.
July 26, 1982	Brief, amici curiae, of the City of Boise, et al. filed.
July 28, 1982	DISTRIBUTED. SL13P2.
Sept. 22, 1982	Response requested.
Oct. 8, 1982	Order extending time for the Government to file a response to the petition until Nov. 21, 1982.
Nov. 23, 1982	Brief for the Federal Respondent in opposition filed.
Dec. 1, 1982	DISTRIBUTED. 1-7
Jan. 10, 1983	REDISTRIBUTED. 1-14.
Jan. 17, 1983	The motion of United States Conference of Mayors for leave to file a brief as amicus curiae is GRANTED. Petition GRANTED. Powell, J., OUT.

Feb. 18, 1983	Order extending time to file the joint appendix and petitioner's brief on the merits until until Apr. 2, 1983. Order extending time to file the respondent's brief on the merits until May 14, 1983.

(Over)

81-2332

Title

No.

DATE	PROCEEDINGS AND ORDERS
March 31, 1983	Joint appendix filed.
March 31, 1983	Brief for the petitioner filed.
April 1, 1983	Brief, amicus curiae, of the City of Norfolk Virginia in support of petitioner filed.
Apr. 1, 1983	Motion for leave to file brief, amici curiae, of The United States Conference of Mayors, et al. filed.
Apr. 2, 1983	Brief, amicus curiae, of the Boston Redevelopment Authority filed.
Apr. 2, 1983	Motion for leave to file brief, amicus curiae, of The National Institute of Municipal Law Officers filed.
Apr. 5, 1983	Brief, amici curiae, on behalf of The Community Redevelopment Agencies of the City of Los Angeles, et al. in support of petitioners filed.
Apr. 5, 1983	Order extending time to file the FEDERAL RESPONDENT'S BRIEF ON THE MERITS until May 2, 1983. (Supporting petitioner)
Apr. 5, 1983	Order extending time to file the NON-FEDERAL RESPONDENT'S BRIEF ON THE MERITS until June 13, 1983. (Supporting petitioner).
Apr. 7, 1983	Brief, amicus curiae, of the City of New York filed.
Apr. 18, 1983	The motion of National Institute of Municipal Law Officers for leave to file a brief as amicus curiae is granted. The motion of United States Conference of Mayors, et al. for leave to file a brief as amici curiae is granted. Powell, J., OUT.
May 2, 1983	Motion of The Mountain States Telephone And Telegraph Company, et al. for leave to file as amici curiae in support of respondents filed.
May 2, 1983	Brief for the Federal Respondent filed.
May 16, 1983	The motion of Mountain States Telephone and Telegraph Company, et al. for leave to file a brief as amici curiae is GRANTED. Powell, J., OUT.
May 12, 1983	Motion of the Solicitor General for divided argument filed.
June 10, 1983	Brief of respondent Telephone Company of Virginia filed.
June 13, 1983	The motion of the Solicitor General for divided argument is GRANTED. Powell, J., OUT.
June 10, 1983	Motion of The American Gas Association for leave to file a brief as amicus curiae filed.
June 10, 1983	Motion of The Brooklyn Union Gas Company for leave to file a brief as amicus curiae filed.
June 20, 1983	The motion of American Gas Association for leave to file a brief as amicus curiae is granted. Justice Powell took no part in the consideration or decision of this motion.

NO. 81-2332-CFX	TITLE Norfolk Redevelopment and Housing Authority, etc., Petitioner v. Chesapeake and Potomac Telephone Company of Virginia, et al.
DOCKETED	COURT
June 22, 1982	United States Court of Appeals for the Fourth Circuit

DATE	PROCEEDINGS AND ORDERS
June 27, 1983	The motion of respondent Brooklyn Union Gas Company for leave to file a brief as amicus curiae is granted. Justice Powell took no part in the consideration or decision of this motion.
July 8, 1983	CIRCUATED.
Aug. 15, 1983	SET FOR ARGUMENT. Monday, October 3, 1983. (4th case)
Sept. 22, 1983	Reply memorandum for the Federal Respondent uring reversal. (D).
Oct. 3, 1983	ARGUED.
Sept. 23, 1983	Reply Brief of Petitioner.